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THE

AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY,

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN DECISIONS", AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

BY A. C. FREEMAN,

AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. III.

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VOL. III

CASES

IN THE

SUPREME COURT OF ERRORS

OF

CONNECTICUT.

HURLBUT *v.* MCKONE.

[55 CONNECTICUT, 81.]

IN ACTION TO ENJOIN CONTINUANCE OF NUISANCE AND FOR DAMAGES, it is an insufficient defense that the business alleged to be a nuisance is *per se* lawful, and the use made by the defendant of his own property is reasonable; nor is it sufficient that the locality is one in which there is a large number of other manufacturing establishments, and the neighborhood is largely occupied by mechanics and tenement-houses; nor that the plaintiff elected to build in the locality on his own land, and reside there after the defendant erected the nuisance.

QUESTION OF REASONABLE USE OF ONE'S PROPERTY is to be determined in view of the rights of others.

NUISANCE — PROPER ELEMENTS OF DAMAGE — EVIDENCE PRESUMED TO BE USED FOR PROPER PURPOSE. — A suit was brought for an injunction against the continuance of a nuisance, and also for damages. The court, in its findings, went beyond the allegations of the complaint in two particulars, namely, with regard to the intolerable character of the nuisance, and its effect upon the health of the plaintiff and his family. *Held*, that as the suit was for an injunction and also for damages, it would be presumed, in the absence of any evidence to the contrary, that the facts unalleged were applied by the judge to the matter of the injunction, and were not considered by him as ground for additional damages, especially as there was no objection to the facts in the court below.

SUIT for an injunction against the continuance of a nuisance, and for damages. The facts appear in the opinion.

H. C. Robinson and E. H. Hyde, Jr., for the appellants.

C. H. Briscoe and C. A. Safford, for the appellee.

By Court, LOOMIS, J. This is a complaint for an injunction, and for the recovery of damages on account of an alleged nui-

sance erected and continued by the defendants on their own land, adjacent to the plaintiff's dwelling-house.

The trial court found the issue for the plaintiff, and assessed his damages at one thousand dollars; but pending the suit there was such a change made by the defendants in the mode of operating their works as to render the preventive remedy asked for unnecessary, and therefore the injunction was denied.

The eight errors assigned may, for the purposes of this review, be reduced to two; namely, that the facts found will not sustain any judgment for the plaintiff; and that the court entertained improper elements of damage, which increased the amount of the judgment.

1. Under the first head the question is, whether the existence and operation of the defendants' steam planing-mill, in the manner in which it was conducted and located, so materially interfered with the comfort and enjoyment of the plaintiff and his family in their dwelling-house as to constitute a nuisance. The finding of the court is so full and strong on this point that it would seem conclusive. It is as follows: "The defendants use the shavings and sawdust from their machines for fuel to generate steam. Such light and combustible fuel makes a great deal of smoke and cinders. The machinery of the mill, whenever it is in motion, makes much noise; so great is the noise of the machinery, and so near is it to the plaintiff's house, that when it is in motion it is impossible for the plaintiff or the members of his family to read, write, or carry on conversation without great difficulty. It causes the house to jar so that the windows rattle in the casings; dishes and other like things standing on the table or on shelves will shake and jolt together. The health of the plaintiff and his family has been injured. A tenant in the house, a Mrs. Whiting, was sick there and died. Her medical attendant testified in court that she suffered greatly from the noise of the defendants' machinery, and that her disease was aggravated and her death hastened by it. The wife of the plaintiff, being in a delicate state of health, has suffered very much from headaches caused by the noise. The value of the house has been and is greatly impaired, — especially its rental value. The plaintiff has been unable to procure tenants, and such as he does procure are unwilling to pay as much rent as he before received. The smoke and cinders from the defendants' chimney came into the plain-

tiff's yard and into his house whenever a door or window was opened. Clothes in the yard hung out to dry were made foul so that they had to be washed again. Everything in the house was soiled, — the floors, carpets, walls, windows, curtains, and even the table on which they ate their meals. Upon more than one occasion the plaintiff and his family were unable to eat the meal which had been prepared for them, so dense and noisome was the smoke which came into the house from the defendants' mill. In some or all of these ways the plaintiff has been troubled, annoyed, injured, discomforted, and distressed, and the house made almost uninhabitable ever since the defendants erected their mill."

This surely was no trifling inconvenience which the civilities of good neighborhood, in a thickly settled and industrious community, required the plaintiff to bear in silence, nor was it a matter painful merely to a cultivated taste, but the finding makes it, beyond all controversy, a matter of great physical discomfort, powerfully affecting the comfortable enjoyment of the plaintiff's home, and impairing the health of his family and the value of his property.

But it is suggested that the defendants' business was *per se* lawful, and the use made of their own property was reasonable.

We concede that the law will not interfere with a use that is reasonable. But the question of reasonable use is to be determined in view of the rights of others. Even a cooking-stove may be so located and used as to make it a nuisance to the adjacent proprietor, as in *Grady* v. *Wolnser*, 46 Ala. 381; 7 Am. Rep. 593. The owner may erect buildings with chimneys, and build fires therein in a proper manner, because these are among the necessary incidents to such property, but he has no right to burn fuel in the making of such fires that develops dense masses of smoke to the injury of his neighbor, nor to build his chimneys so as to send the smoke into his neighbor's house: Wood on Nuisances, sec. 432.

It is further said that the place in question was a manufacturing locality, and that the plaintiff's annoyances and damage were only such as were incident to the neighborhood where he had elected to reside.

In determining whether the defendants violated any just rights of the plaintiff, the location and surroundings are to be considered, for it is undoubtedly true that what constitutes a nuisance in one locality may not be in another, and we can

fully accept the rule laid down in *McCaffrey's Appeal*, 105 Pa. St. 253. "A person who resides in the center of a large city must not expect to be surrounded by the stillness which prevails in a rural district. He must necessarily hear some of the noise, and occasionally feel slight vibrations produced by the movement and labor of its people and by the hum of its mechanical industries."

And if we should adopt the distinction laid down by Lord Chancellor Westbury in *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. Cas. 650, cited by the defendants, between a nuisance producing a material injury to property, where the right of action is absolute, and an alleged nuisance which produces merely personal annoyance and discomfort, where the right of action depends "greatly on the circumstances of the place where the thing complained of occurs," we still think there is no authority that would deny a right of action under the facts and circumstances of this case as described in the finding. The vivid language of Thompson, J., in delivering the opinion in *Dennis* v. *Eckhardt*, 3 Grant Cas. 390, with slight changes, would seem to describe this case. "Some discomforts must be endured as compensation for the conveniences of city life; . . . . but I cannot find authority in law for saying that a thing which fills the atmosphere that others have a right to live in with offensive smoke and odors, stifles the breath, produces nausea and headache, ... prevents the drying of clothes and ventilation of houses, darkens the sunlight, and converts pleasant residences into prison-houses in dog-days, and defiles carpets, curtains, and dinner-plates with deposits of soot and dirt, is not a nuisance, even though the results are only occasional."

The claim of the defendants, that the locality is one "given over to mechanical industries," is not in full accord with the finding. The plaintiff's house is on Governor Street, and on this street there is no claim that there are any manufacturing establishments. There are such on Sheldon Street, and it is found that "within one thousand or fifteen hundred feet of the defendants' premises there are a number of other manufacturing establishments, and the neighborhood within the distance above stated is largely occupied by mechanics and by tenement-houses." All these manufacturing establishments are of course still more remote from the plaintiff's house, and the distance obviously is so great as to preclude any annoyance from smoke, cinders, or the jar of machinery, and the noise

must be so softened that it could not well be a nuisance. All the discomfort which the plaintiff can suffer, therefore, of the kind referred to, must come from the establishment of the defendants, only twenty-one feet distant from his house. It is probably in the power of the defendants, without great expense, to avoid all just ground for complaint. The court finds they have already done so, mostly in respect to smoke and cinders.

In regard to the suggestion that the plaintiff elected to reside in this locality, there is nothing to show that the objectionable business of the defendants had ever been carried on before the plaintiff took possession, but rather the contrary, for they did not build till 1884. If, however, it were otherwise, and the plaintiff knew of the nuisance, and then went and took up his abode near it, he would not thereby be precluded from maintaining his action. A man is not to be precluded from building and living on his own land because the adjoining proprietor first erected a nuisance, which indeed was no nuisance till somebody went there to live: *Hole* v. *Barlow*, 27 L. J. Com. P. 208; *Commonwealth* v. *Upton*, 6 Gray, 473; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659. In regard to any suggestion arising from the fact that the dwelling-houses in the vicinity are largely occupied by mechanics and tenants, we fully approve and adopt the language of Chancellor Zabriskie in delivering the opinion in *Ross* v. *Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654: "I find no authority that will warrant the position that the part of a town which is occupied by tradesmen and mechanics for residences and carrying on trades and business, and which contains no elegant or costly dwellings, and is not inhabited by the wealthy and luxurious, is a proper or convenient place for carrying on business which renders the dwellings there uncomfortable to the owners and their families, by offensive smells, smoke, cinders, or intolerable noises, even if the inhabitants themselves work at trades occasioning some degree of noise, smoke, and cinders. There is no principle in law or reason which would give protection to the large comforts and enjoyments with which the wealthy and luxurious are surrounded, and fail to secure to the artisan and laborer and their families the fewer and more restricted comforts which they enjoy."

2. The remaining question is, whether there entered into the judgment any improper elements of damage.

The defendants say, in substance, that the court assessed

damages for injuries not actionable, but what injuries are referred to the assignments of error do not mention at all. This amounts to no more than a general assignment of error, which is contrary to the rule on this subject, and might be disregarded, but as the defendants were heard in argument upon the question, it may be more satisfactory to dispose of it upon its merits.

Resorting, then, to the oral argument before this court to supply the omission referred to, we find that after a critical analysis of the finding the counsel for the defendants are able to specify a few particulars wherein the court, in describing the effects of the nuisance, went beyond the allegations in the complaint; for instance, the complaint, in referring to the effect upon the health of the plaintiff and his family, says simply that it was endangered, whereas the finding is that it was injured; also, where the complaint only speaks of the effect of the running of the defendants' machinery as causing an intolerable noise, making it impossible to hear conversation, the finding states, in addition, that it caused the house to jar, and made the windows rattle and the dishes jolt together. Now, without stopping to show how far these facts might come in under the general allegations of the complaint in respect to being harassed, annoyed, and made uncomfortable, and the house being made unfit for habitation, we may concede, for the purposes of discussion, that in the two particulars mentioned, the finding specifies injuries not specifically alleged, and our answer is, that the inference attempted to be drawn therefrom, that the court gave damages for those additional injuries, is unwarrantable. It should be borne in mind that the suit was for an injunction, and also for damages, and the evidence to be received and the facts to be found and made part of the record had reference necessarily to both remedies.

All the necessary effects of running the defendants' machinery in close proximity to the plaintiff's house were to be inquired into upon the trial, in order to determine whether it was a nuisance, and whether it was such a one as to demand the extraordinary remedy of an injunction. The facts referred to, therefore, had a proper office to perform. "Health endangered" was perfectly established when the court found health actually injured, for the greater must include the less, and health injured was a much stronger reason for an injunction, as the nuisance if continued might result in the permanent impairment of health. So as to the other fact, if the

machinery operated with such tremendous power as to jar the house itself, the court not only would see how intense and intolerable the noise must have been, and that the allegation in that respect was true, but that the necessity for an injunction was more urgent on that account. Now, our conclusion is, that as all the facts referred to had a perfectly legitimate office to perform in the mind of the trial judge, it is to be conclusively presumed, in the absence of any evidence to the contrary shown by the record, that they were so applied. This principle has often been invoked to prevent a new trial for an alleged improper admission of evidence, where there was a general objection at the time, and the court received the evidence but gave no indication as to the use to be made of it, and where for one purpose it would have been proper, but for another very improper. The party in such cases is never allowed to say it was used for the improper purpose. The analogy is perfect, only in the case at bar there is stronger reason to apply the principle, because there was no objection at all to the facts in the court below, and yet, in effect, we are asked to reverse the presumption, and hold that where facts had a legitimate and an illegitimate purpose it must be conclusively presumed in favor of the latter. We cannot accede to such an extraordinary demand.

There was no error in the judgment complained of.

BUSINESS MUST BE SO CONDUCTED AS NOT TO CONSTITUTE NUISANCE. Otherwise it will be enjoined: *Sullivan* v. *Royer*, 1 Am. St. Rep. 51, and note 54; *Rhodes* v. *Dunbar*, 98 Am. Dec. 221, and note 229; *Seifried* v. *Hays*, 50 Am. Rep. 167, and note 171; *Appeal of Pennsylvania Lead Co.*, 42 Id. 534; *Pruner* v. *Pendleton*, 40 Id. 738; *Minks* v. *Hofeman*, 29 Id. 63; *Dittman* v. *Repp*, 33 Id. 325; *McKeon* v. *See*, 10 Id. 659; *Adams* v. *Michael*, 17 Id. 516.

STATE v. GLIDDEN.

[55 CONNECTICUT, 46.]

IT WILL BE ASSUMED THAT INTENTION WAS TO CHARGE BUT ONE OFFENSE, where all the counts in an information are manifestly based upon one and the same transaction.

COMBINATION OF TWO OR MORE PERSONS TO COMMIT CRIME OR MISDEMEANOR, or to effect a lawful purpose by unlawful means, is itself an offense.

IT IS CRIMINAL OFFENSE for two or more persons, corruptly or maliciously, to confederate and agree together to deprive another of his liberty or property.

ACTS OF PERSONS IN COMBINING TOGETHER TO INTIMIDATE EMPLOYER, and to compel him against his will to discharge his workmen, and employ such other persons as the conspirators should name, fall within the prohibition of the Connecticut act of 1878, chapter 92, which subjects to a fine or imprisonment "every person who shall threaten or use any means to intimidate any person, to compel such person, against his will, to do or abstain from doing any act which such person has a legal right to do, or shall persistently follow such person in a disorderly manner, or injure or threaten to injure his property, with intent to intimidate him."

CONSPIRACY — CORRUPT AND MALICIOUS CONDUCT. — An information alleged that the defendants conspired to threaten and use means (the boycott) to intimidate the Carrington Publishing Company, to compel it, against its will, to abstain from doing an act (to keep in its employ workmen of its own choice) which it had a legal right to do, and to do an act (employ the defendants and such persons as they should name) which it had a legal right to abstain from doing: *held*, that, looking at the transaction as it appeared on the face of the information, the defendants' purpose was to deprive the publishing company of its liberty to carry on its business in its own way, although in doing so it interfered with no right of the defendants; the motive was to gain an advantage unjustly and at the expense of others, and therefore the act was legally corrupt; and as a means of accomplishing the purpose, the parties intended to harm the publishing company, and therefore it was malicious.

ID. — CRIME IN OPPRESSING WORKMEN. — The information further alleged that another purpose of the defendants was to injure and oppress certain workmen of the publishing company: *held*, that a crime was charged, within the contemplation of the statute.

ID. — CRIME IN EXTORTING MONEY. — The information also alleged that one object of the defendants was to extort money from the publishing company by unlawful means: *held*, that a crime was charged.

ID. — WHOLESALE BOYCOTTING. — It was charged that the defendants not only attempted to injure the publishing company, but also contemplated the "wholesale boycotting" of all the patrons of that company: *held*, that such conduct must be regarded as *prima facie* malicious and corrupt.

ID. — TERM "BOYCOTT" DEFINED. — The means by which it is generally sought to accomplish a boycott are not only unlawful, but are in some degree criminal.

ID. — ADMISSIBILITY IN EVIDENCE OF DECLARATIONS OF CO-CONSPIRATOR. — One of the conspirators, not a defendant, made declarations to a workman in the employ of the publishing company, that if they, the conspirators, had another battle, the publishing company would have to pay the expenses of the boycott. The purpose was to induce the workman to join the conspiracy. *Held*, that the declarations might be regarded as acts in the prosecution of the object of the conspiracy, and as such they were admissible.

ID. — EVIDENCE, RELEVANCY OF. — After the introduction of evidence to prove that the defendant Glidden had been active in attempting to induce the public not to patronize the publishing company, a witness testified that he saw two persons, one of whom was Glidden, walking up and down one of the most frequented streets, in company and close together, and that from between them copies of a circular urging

the public to boycott the publishing company were from time to time dropped on the sidewalk, but the witness was unable to say which of the two dropped them: *held*, that the testimony was properly admitted, and upon that evidence the jury might well find that Glidden distributed the circulars.

ID. — EVIDENCE AS TO WHAT WAS DONE IN FORMER BOYCOTT. — The same defendants had previously been active in boycotting a paper called the News; and it appeared that in carrying out the conspiracy against the publishing company frequent reference was made to the News boycott, the conspirators proclaiming their purpose to pursue the same general policy against the publishing company, including a demand that the expenses should be paid: *held*, that the effect of the references to the News boycott was a threat, and to enable the jury to appreciate the full force of the threat, evidence was admissible to show what was done in that case.

ID. — EVIDENCE PROPERLY EXCLUDED. — A witness for the state testified to an interview which he had with the proprietors of the News, relative to the payment of expenses by them. On cross-examination the witness was asked to state what the defendant Glidden had said to him in regard to the same matter at a subsequent time, the state having made no allusion to it on the direct examination. *Held*, that the evidence was inadmissible.

ID. — TESTIMONY OF CO-CONSPIRATOR, NOT DEFENDANT. — One of the conspirators, not a defendant, was called by the state for the purpose of proving that he had printed circulars used by the defendants in the boycott of the publishing company. The witness declined to testify, on the ground that his testimony would tend to criminate himself. The judge of another court was then called to testify what the witness had sworn to in reference to the matter on the trial of another case before him. *Held*, that the testimony was properly admitted.

ID. — ADMISSIONS OF CONSPIRATORS. — A witness for the state testified that she overheard a conversation among five or six printers, members of the Typographical Union, which commenced the boycott, and among whom was one of the defendants, the others not identified, in which it was stated, but by whom she could not say, that they were paying fifty cents a week for the expenses of the boycott, and that it would be paid for by the publishing company: *held*, that the evidence was admissible, not only against the defendant, who was present, but against the other defendants as well.

INFORMATION for a conspiracy. The first count, referred to in the opinion, and said to embrace the substance of all the others, charged the object of the conspiracy to have been,— 1. To compel the Carrington Publishing Company, against its will, to discharge its workmen and to employ such persons as the defendants and their associates should name; and 2. To injure and oppress the workmen then in the employ of said corporation, by depriving them of their said employment. That the means to be employed to accomplish said purposes were to demand the discharge of said workmen, and the employment of the defendants, etc.; and if such demand were not complied

with within forty-eight hours, the defendants and their associates were to represent to and threaten said corporation that there were associated in combination with the defendants, the members, in said city, of divers secret and large labor unions, to the number of one thousand persons, who could, by the fear and terror to be created by the secrecy and discipline of this said secret organization, and by the large number of the members thereof, and by the to be threatened and concerted withdrawal of the patronage of the defendants and their associates, and by stopping and promoting the patronage of others, through threats and intimidations, and by other unlawful means, would so control the persons dealing with said corporation as to compel them, though against their will, to cease doing business with said corporation; and who could and would boycott the business of said corporation, and so would substantially injure and destroy its business, and prevent the same from being carried on, unless said corporation would discharge said workmen, and employ the defendants, etc. And if said corporation did not yield to said demands, the defendants and their associates would, in like manner, represent to and threaten all persons dealing with said corporation; and that they could and would so control, boycott, and injure the business customers of such persons as through fear, etc., and by the to be threatened and concerted withdrawal of the patronage of the defendants, etc., and by stopping and preventing the patronage of others through the threats and intimidations, and by other unlawful means to compel such customers, though against their will, to cease doing business with the subscribers and others, patrons of said corporation; and that the defendants would not give up or abandon said proceeding to injure the business of said corporation until they had either destroyed and prevented said business from being carried on, or until said corporation should comply with their said demands, and should further pay to the defendants a large sum of money, viz., five hundred dollars, to defray the expenses of the defendants and their said associates in so carrying out said conspiracy. It was then charged that such demand was made on the corporation, and was not complied with; that, therefore, the agreed representations and threats were made to said corporation; that said corporation still refusing to yield, the agreed representations and threats were made to the subscribers and patrons of said corporation, etc. The Carrington Publishing Company was a corporation en-

gaged in publishing a daily newspaper and advertising medium, called the Journal and Courier. Other facts appear in the opinion.

Platt and Russell, and J. T. Moran, for the appellants.

J. W. Alling, for the state.

By Court, CARPENTER, J. This is an information for a conspiracy. The defendants demurred to the information; their demurrer was overruled. They then pleaded not guilty; the verdict was guilty as to all but one of the defendants; the defendants convicted appealed. The appeal raises a question as to the sufficiency of the information, and also some questions of evidence.

Is an offense sufficiently charged in the information? There are six counts. The verdict was taken separately as to each defendant on each count. The three defendants who were convicted were found guilty on all the counts.

We assume that it was the intention of the attorney to charge but one offense, as all the counts are manifestly based upon one and the same transaction. The first count [set out above] seems to embrace the substance of all the others, so that we have no occasion further to consider the different counts separately.

We will next inquire, What is a criminal conspiracy? We will not attempt to formulate in a single sentence a definition which will embrace every case of conspiracy which the law will regard as criminal. Such a definition will of necessity embrace not only a great variety of subjects, but also many distinct and independent classes of subjects. We shall therefore have a better understanding of the matter if we consider each part of such a definition by itself, each part having reference to a class of objects or purposes which may form the subject of a criminal conspiracy.

In the first place, it seems to be generally conceded that if two or more persons confederate and agree together to commit some crime or misdemeanor, such confederation or agreement is itself an offense. Here we are hardly on debatable ground; and here we will pause and apply this partial definition to this information.

A statute passed in 1878 provides that "every person who shall threaten or use any means to intimidate any person, to compel such person, against his will, to do or abstain from

doing any act which such person has a legal right to do, or shall persistently follow such person in a disorderly manner, or injure or threaten to injure his property, with intent to intimidate him, shall upon conviction be liable to a fine not exceeding one hundred dollars, or imprisonment in the county jail six months": Session Laws of 1878, c. 92.

This statute was unquestionably designed as a substitute for the act of 1877, which doubtless had its origin in the apprehension which prevailed throughout the country at the time of and soon after the trouble on the Pennsylvania railroad, during which there was such an immense destruction of property at Pittsburg. The operation of that act was limited to railroad, gas, and telegraph companies. The act of 1878 removed the limitation, and was designed to protect all persons, natural or artificial, employers or employees, in the management and control of their own business. It simply extended the remedy. We cannot therefore limit the act of 1878 to subjects embraced in the act of 1877, without doing violence to the manifest intention of the legislature.

Do the acts which, it is alleged, the defendants conspired to do, fall within the prohibition of the act of 1878? They proposed to threaten and use means (the boycott) to intimidate the Carrington Publishing Company, to compel it, against its will, to abstain from doing an act (to keep in its employ the workmen of its own choice) which it had a legal right to do, and to do an act (employ the defendants and such persons as they should name) which it had a legal right to abstain from doing. There can be but one answer to the question,—the acts proposed are clearly prohibited by the statute.

We might perhaps stop here; but the argument of the case took a much wider range, and the case itself will justify, and the times in which we live seem to require, a more extended examination of the subject.

Conspiracies against the government, and conspiracies to hinder or obstruct the administration of justice, which are also regarded as criminal conspiracies, need not be considered in this case.

It has often been said that a conspiracy to effect an unlawful purpose, or a lawful purpose by unlawful means, is an offense. But this is said to be a limitation rather than a definition. It certainly lacks definiteness. Many acts are said to be unlawful which would not be the subject of a criminal conspiracy. Other acts are unlawful because they are in vio-

lation of the criminal law or of some penal statute. If the ends or the means are criminal in themselves, or contrary to some penal statute, the conspiracy is clearly an offense. Between these two extremes a great variety of cases may arise, many of which ought not to be regarded as criminal. Suppose two or more boys, for instance, agree to go upon another's land; the proposed act is or may be a trespass, and therefore unlawful. If they do not go, no harm is done; if they do go, they are or may be liable civilly, but no one would seriously contend that in either case they would be liable criminally for the conspiracy. But suppose two or more conspire unjustly and wrongfully to deprive another of his liberty or property; then, as we shall hereafter see, the criminal law may take cognizance of the act. Of course it is difficult, if not impossible, to define accurately and clearly in advance what would and what would not be an offense. Hence the difficulty of regulating by statute in all cases the law of criminal conspiracy. But this difficulty is not confined to these cases. There are other offenses at common law that are not defined by any statute. The statute prescribes a penalty for such cases without attempting to define in advance the acts which shall constitute an offense. It is left for the court to determine in each particular case whether it is or is not an offense. For instance, it has been held an offense at common law for a prisoner to escape from jail, and for one to solicit another to commit the crime of adultery. Neither of these acts is forbidden by statute, yet it was held in each case, after the act, that it was an offense. The supposed hardship is only apparent; it is not real. The danger that an innocent man will be punished criminally for a conspiracy, because the act was not forbidden by the written law, is very small. It is hardly supposable that prosecutions will be instituted and sustained by the court and jury unless the acts done or contemplated are clearly illegal and morally wrong; so much so as to leave little or no room for a right-minded man to doubt.

If we were to attempt to give a rule applicable to this branch of the subject, we should say that it is a criminal offense for two or more persons corruptly or maliciously to confederate and agree together to deprive another of his liberty or property. Such a rule is proximately correct and practically just.

Now, if we look at this transaction as it appears on the face of this information, we shall be satisfied that the defendants'

purpose was to deprive the Carrington Publishing Company of its liberty to carry on its business in its own way, although in doing so it interfered with no right of the defendants. The motive was a selfish one, — to gain an advantage unjustly, and at the expense of others; and therefore the act was legally corrupt. As a means of accomplishing the purpose, the parties intended to harm the Carrington Publishing Company, and therefore it was malicious. It seems strange that in this day, and in this free country, — a country in which law interferes so little with the liberty of the individual, — it should be necessary to announce from the bench that every man may carry on his business as he pleases, — may do what he will with his own, so long as he does nothing unlawful, and acts with due regard to the rights of others; and that the occasion for such an announcement should be, not an attempt by government to interfere with the rights of the citizen, nor by the rich and powerful to oppress the poor, but an attempt by a large body of workingmen to control, by means little if any better than force, the action of employers. The defendants and their associates said to the Carrington Publishing Company: "You shall discharge the men you have in your employ, and you shall hereafter employ only such men as we shall name. It is true, we have no interest in your business, we have no capital invested therein, we are in no wise responsible for its losses or failures, we are not directly benefited by its success, and we do not participate in its profits; yet we have a right to control its management, and compel you to submit to our dictation." The bare assertion of such a right is startling. The two alleged rights cannot possibly co-exist. One or the other must yield.

If the defendants have the right which they claim, then all business enterprises are alike subject to their dictation. No one is safe in engaging in business, for no one knows whether his business affairs are to be directed by intelligence or ignorance, — whether law and justice will protect the business, or brute force regardless of law will control it; for it must be remembered that the exercise of the power, if conceded, will by no means be confined to the matter of employing help. Upon the same principle and for the same reasons, the right to determine what business others shall engage in, when and where it shall be carried on, etc., will be demanded and must be conceded. The principle, if it once obtains a foothold, is aggressive, and is not easily checked. It thrives on what it

feeds on, and is insatiate in its demands. More requires more. If a large body of irresponsible men demand and receive power outside of law, over and above law, it is not to be expected that they will be satisfied with a moderate and reasonable use of it. All history proves that abuses and excesses are inevitable. The exercise of irresponsible power by men, like the taste of human blood by tigers, creates an unappeasable appetite for more.

Business men have a general understanding of their rights under the law, and have some degree of confidence that the government, through its courts, will be able to protect those rights. This confidence is the corner-stone of all business. But if their rights are such only as a secret and irresponsible organization is willing to concede to them, and will receive only such protection as such an organization is willing to give, where is that confidence which is essential to the prosperity of the country?

Again, if the alleged right is conceded to the defendants, a similar right must be conceded to the promoters of the Carrington Publishing Company and those with whom they may associate; otherwise all men are not equal before the law. It logically follows that they in turn may control the business matters of the defendants,—may determine what trade or occupation they may follow, whether to work in this establishment or in that, or in none at all. Obviously such conflicting claims, in the absence of law, can lead to but one result, and that will be determined by brute force. It would be an instance of the survival, not necessarily of the fittest, but of the strongest. That would be subversive, not only of all business, but also of law and of the government itself. The end would be anarchy, pure and simple.

Once more: suppose the government should assert the right in the same manner to regulate and control the business affairs of the Carrington Publishing Company and other business enterprises, how long would the people submit to it? And yet the exercise of such a power by government would be far more tolerable than its exercise would be by secret organizations, however wise and intelligent such organizations might be; for government is established by the people and for the people, and is responsible to all the people. If it abuses its power, the people have the remedy in their own hands; but if a secret organization, in the management of which the

people at large have no voice, abuses its power, and is not amenable to law, where is the remedy?

It is further alleged that another purpose of the defendants was to injure and oppress John E. Skinner and seven other workmen of the Carrington Publishing Company, by depriving them of their employment. What we have already said applies equally well to this purpose of the defendants. The workmen named have just as good a right to work for the corporation as the defendants have, and this right is entitled to the same consideration and the same protection.

Then there are these further considerations: it is a combination, not against capital nor employers, but against fellow-workmen,—men whose earnings are comparatively small, and who presumably need all their earnings for the support of themselves and their families. They are ordinarily poor men, and men whose entire capital consists in their trade and time. It is proposed wantonly to deprive them of a livelihood, and practically of all means of support. If a capitalist is driven from his business, he has other resources; but the poor mechanic, driven from his employment, and, as is often the case, deprived of employment elsewhere, is compelled to see his loved ones suffer or depend upon charity.

It is also a combination of many to impoverish and oppress a few. The weaker party needs and must receive the protection of the law. If in any case it is criminal for many to combine to do what any one may lawfully do singly, it would seem that this would be such a case. Numbers can accomplish what one man cannot,—evil as well as good; and that is the reason of the combination. The law encourages combinations for good, and combinations by workmen to better their condition by legitimate and fair means are commendable, and should be encouraged. But combinations for evil purposes, whether by one class of men or another, are detrimental to the public weal and cannot be regarded with favor by the courts. But combinations for good purposes may be perverted, and when their power is sought to be used to harm their fellow-men, to deprive others of their just rights, then, not the combination, but the use of it, becomes criminal. In such use there is a large element of wantonness and malice. Any one man, or any one of several men, acting independently, is powerless; but when several combine and direct their united energies to the accomplishment of a bad purpose, the combination is formidable. Its power for evil increases as its num-

bers increase. No one man can drive these workmen from their situations; numbers, if allowed their will, may do it. The intention by one man, so long as he does nothing, is not a crime which the law will take cognizance of; and so, too, of any number of men acting separately; but when several men form the intent, and come together and agree to carry it into execution, the case is changed. The agreement is a step in the direction of accomplishing the purpose. The combination becomes dangerous and subversive of the rights of others, and the law wisely says that it is a crime.

It is no answer to say that the conspiracy was for a lawful purpose, — to better their own condition, to fix and advance their rate of wages, and further their own material interest. It is certainly true that they had a right to have such a purpose, and to use all lawful means to carry it into effect. And so a purpose to acquire property is lawful so far as it contemplates lawful means only. But if it contemplates the acquisition of money by means of murder, theft, fraud, or injustice, the end does not sanctify the means.

Neither will these defendants be permitted to advance their material interests, or otherwise better their condition, by any such reprehensible means. They had a right to request the Carrington Publishing Company to discharge its workmen and employ themselves, and to use all proper argument in support of their request; but they had no right to say, "You shall do this, or we will ruin your business." Much less had they a right to proceed to ruin its business. In such a case, the direct and primary object must be regarded as the destruction of the business. The fact that it is designed as a means to an end, and that end in itself considered is a lawful one, does not divest the transaction of its criminality.

In considering the demurrer, we would not overlook the fact that it is alleged that one object of the defendants was to extort money from the Carrington Publishing Company. It must be conceded that the exaction of money otherwise than by legal means is unlawful in a criminal sense. But the sufficiency of this information does not depend upon that allegation. It is therefore unnecessary to notice it further.

Neither do we overlook the character and magnitude of this conspiracy, as evidenced by the wholesale boycotting contemplated of the patrons of the Carrington Publishing Company. Perhaps no new or different principle applies to this part of the case. We cannot forbear remarking, however, that it

evinces a recklessness and disregard of the rights of others seldom witnessed in business affairs. Assuming, as we do, that these defendants are honest, well-meaning men, it is difficult for us to understand how they could be willing to involve the innocent patrons of the Carrington Publishing Company in embarrassment, and possible ruin, merely for the purpose of furthering their cause in a controversy in which these patrons were not concerned. *Prima facie*, such conduct must be regarded as malicious and corrupt.

We will also notice that it is alleged that the conspiracy contemplated boycotting as a means to the end sought. That word is not easily defined. It is frequently spoken of as passive merely,—a let-alone policy,—a withdrawal of all business relations, intercourse, and fellowship. If that is its only meaning, it will be difficult to find in it anything criminal. We may gather some idea of its real meaning, however, by a reference to the circumstances in which the word originated. Those circumstances are thus narrated by Mr. Justin McCarthy, an Irish gentleman of learning and ability, who will be recognized as good authority. In his work entitled "England under Gladstone," he says: "The strike was supported by a form of action, or rather inaction, which soon became historical. Captain Boycott was an Englishman, an agent of Lord Earne, and a farmer of Lough Mark, in the wild and beautiful district of Connemara. In his capacity as agent he had served notices upon Lord Earne's tenants, and the tenantry suddenly retaliated in a most unexpected way, by, in the language of schools and society, sending Captain Boycott to Coventry in a very thorough manner. The population of the region for miles round resolved not to have anything to do with him, and as far as they could prevent it, not to allow any one else to have anything to do with him. His life appeared to be in danger,—he had to claim police protection. His servants fled from him as servants flee from their masters in some plague-sticken Italian city. The awful sentence of excommunication could hardly have rendered him more helplessly alone for a time. No one would work for him,—no one would supply him with food. He and his wife had to work in their own fields themselves, in most unpleasant imitation of Theocritan shepherds and shepherdesses, and play out their grim eclogue in their deserted fields with the shadows of the armed constabulary ever at their heels. The Orangemen of the north heard of Captain Boycott and his sufferings, and the

way in which he was holding his ground, and they organized assistance, and sent him down armed laborers from Ulster. To prevent civil war, the authorities had to send a force of soldiers and police to Lough Mark, and Captain Boycott's harvests were brought in and his potatoes dug by the armed Ulster laborers, guarded always by the little army."

If this is a correct picture, the thing we call a boycott originaly signified violence, if not murder. If the defendants in their hand-bills and circulars used the word in its original sense, in its application to the Carrington Publishing Company, there can be no doubt of their criminal intent. We prefer, however, to believe that they used it in a modified sense. As an importation from a foreign country, we may presume that they intended it in a milder sense,—in a sense adapted to the laws, institutions, and temper of our people. In that sense it may not have been criminal. But even here, if it means, as some high in the confidence of the trades-union assert, absolute ruin to the business of the person boycotted unless he yields, then it is criminal. Instances are not wanting in our own country where the boycott has been attended with more or less violence; and it cannot be denied that the natural tendency is, especially when applied by the ignorant and vicious, to attempt to make it successful by force. It too often leads to serious disturbances of the peace, and even murder. We are loath, however, to assume that these defendants intended any such consequences. Nevertheless it is a dangerous instrumentality to use; and if those instigating and resorting to it do not of their own accord take notice of its peril, and voluntarily abandon its use, as we sincerely hope they will, the courts at no distant day will be called upon to recognize its dangerous tendency, and treat it accordingly.

From these considerations it is apparent that the purpose of this conspiracy, or the means by which it was to be accomplished, or both, were not only unlawful, but, as some authorities express it, "were in some degree criminal."

We have carefully examined the evidence in this case, and are of the opinion that it is sufficient to sustain the verdict. The only point which we regard as debatable is that relating to the purpose to demand money to pay the expenses of the boycott; but we think, on the whole, the jury were justified in finding that the parties concerned were given to understand that they would be required to pay the expenses. As the boycott never reached such a stage as that such a demand could

with propriety be made, there is no direct evidence that there was any intention to make it, but there were abundant intimations that such a demand would be made, and there can be little doubt that such a probability was distinctly presented as an inducement not to prolong the contest.

The declarations of one Kidd, who, as the evidence shows, was one of the conspirators, although not a defendant, were admitted in evidence against the objection of the defendants. The declarations were made during the continuance of the conspiracy, and for the purpose on the part of the conspirators, including Kidd, of carrying the same into full effect, and related to the way and manner by which the conspirators intended to accomplish their objects and purposes. What Kidd said was in effect that he did not believe the Carrington Publishing Company would fight them as the News did; that they would do the same as they had in the News case, and appeal to the merchants to take their advertisements out, and appeal to the subscribers; and that they would not do as they had done in the News case, but if they had another battle they would have to pay the expenses of the boycott. These declarations were made to one Skinner, a workman in the Courier office. At some time previous to the declarations in question, he had had an interview with Kidd and the defendant Glidden, at which they attempted to induce him to take part with the union in the controversy with the Carrington company, — in other words, to join the conspiracy. The declarations in question, following the efforts by Glidden and Kidd to win over Skinner, may well be regarded as supplementary to those efforts, and designed to make them successful; and so were acts in the prosecution of the object of the conspiracy, and as such were admissible.

As one of the means to carry the conspiracy into effect, the state claimed that Glidden distributed circulars like exhibit I; and to prove that he did so distribute them, after offering evidence to prove that Glidden had been active in attempting to induce the public not to patronize the Courier, offered one Blakeman as a witness, who testified that on the most frequented street in New Haven he one evening saw two persons passing, one of whom was Glidden, and the other he did not know; that these two persons were walking up and down the street in company and close together, and that from between them copies of the circular were from time to time dropped on the sidewalk; but the witness was unable to say which of the

two dropped them. The circular was as follows, in large letters: "A word to the wise is sufficient. Boycott the Journal and Courier." To the admission of this circular the defendants objected; the court admitted it. We think it was properly admitted. Upon that evidence the jury might well find that Glidden distributed the circulars.

A proposed agreement was submitted to the News during the progress of the boycott on that paper, by these defendants, or some of them who were active in that transaction. When offered in evidence, it was objected to but admitted. It is now insisted that it ought not to have been received, for the reason that it is not admissible to prove that the defendants committed a similar offense for the purpose of proving that they committed the offense charged. That proposition is conceded. But we do not understand that the evidence was offered or received for any such purpose. These defendants were active in boycotting the News. In this transaction they frequently referred to that; and proclaimed their purpose to pursue the same general policy, including a demand that the expenses should be paid. The effect of that was a threat; and was understood as such by the parties. Assuming, as we do, that the parties also understood in a general way the details of the News boycott, they must also have understood just what they were to expect. In order that the jury may appreciate the full force of the threat, it is necessary to possess them as far as may be with the same knowledge. The better way to do that would seem to be to show what was done in that case. That disclosed the purposes and intention of the conspirators in the present case. By frequent reference to it as a precedent, they made the details of that case, to some extent at least, relevant and material.

Exhibit L, which was a notice to the News that it would be charged fifty dollars per week as its share of the expenses of the boycott, was admissible for the same reasons.

The state proved that the above-mentioned paper was submitted to the News by one Fowler. During that interview the subject-matter of the News paying the five hundred dollars was talked over between the committee and Fowler. It further appeared that Glidden and Mulcahy personally were not in favor of pressing the money demand, but the committee finally concluded to let it stand. On the cross-examination of Fowler, his attention was called to another interview between him and Glidden, which took place subsequently, and

to which the state on the direct examination had not referred or alluded; and the witness was asked to state what Glidden at such different and subsequent interview said upon this subject of money demand from the News. This inquiry was objected to and excluded. That ruling was clearly correct.

One Mailhouse, one of the conspirators, but not a defendant, was offered as a witness by the state, but declined to testify on the ground that his testimony would tend to criminate himself. The state then offered Judge Deming as a witness, to prove what Mailhouse had sworn to on the trial of another case before the city court. His testimony was received against the defendants' objection. The substance of the testimony was, that he, Mailhouse, printed some circulars used by the defendants in this case during the existence of the claimed conspiracy, and while it was being carried on, and in furtherance thereof. This testimony was objected to, ruled in, and exception taken.

The import of the finding is, that this testimony was offered for the purpose of proving the fact that Mailhouse printed the circulars. The objection being general, perhaps it may fairly be inferred that it was on the ground that that fact was not relevant. If so, the objection is without foundation. It may have been on the ground that it was not competent to prove the fact by the admission of a conspirator who was not a party. But the record discloses no such ground of objection, and counsel for the defense do not allude to it in their brief. As that question has not been discussed, we will not consider it. The only other reason for objecting to it seems to be that the testimony of Mailhouse before the city court was not admissible as the declaration of a co-conspirator. That is the only question that has been discussed, and we must assume that it is the only one the defense intended to raise. Assuming that the defendants are right in this, still they are not entitled to a new trial, because, as we interpret the record, the testimony was not offered for the purpose of proving a mere declaration, but for the purpose of proving the fact that Mailhouse printed the circulars. That is apparent from the fact that Mailhouse himself was first offered as a witness. He would hardly have been offered for the purpose of proving his own declaration, as any other witness could have sworn to it just as well. He was manifestly offered to prove that he printed the circulars.

The state offered one Bertha Palm as a witness, who tes-

tified, against the general objection of the defendants, that she overheard a conversation between five or six printers, members of the union, among whom was the defendant Mulcahy, the others not identified, in which it was stated, but by whom she could not say, that they were paying fifty cents a week for the expenses of the Courier boycott, and that it would be paid for by the Courier. On objection by the defendants, the court ruled that this evidence was admissible.

We are inclined to think that this ruling was correct. The boycott was inaugurated and prosecuted by Typographical Union No. 47. Here were five or six of the members of that union, including Mulcahy, conversing on the subject of that boycott, and one of them remarked that they were paying money to support it, and that it would be paid for by the Courier. From the fact that these men were members of the union, in connection with the further fact that by the statement then and there made they were promoting the boycott by the payment of money, it is not going too far to assume that these men were parties to the conspiracy, and so their declarations were admissible, not only against Mulcahy, but against the other defendants as well. Mulcahy was a party to that conversation, and presumptively he heard the remark. He made no reply, and thereby assented to its truth. We think it tended to show that Mulcahy understood and intended that the Courier should be required to pay the expenses of the boycott.

There is no error, and a new trial is denied.

BOYCOTTING AS CRIMINAL CONSPIRACY: *Smith* v. *People*, 76 Am. Dec. 783, extended note; *State* v. *Donaldson*, 90 Id. 649, and note 654.

CONSPIRACY, SUFFICIENCY OF INDICTMENT: *State* v. *Crowley*, 22 Am. Rep. 719.

CONSPIRACY, ACTION FOR DAMAGES: *Kimball* v. *Harman*, 6 Am. Rep. 340; *Mapstrick* v. *Ramge*, 31 Id. 415; *Wildee* v. *McKee*, 56 Id. 271.

DECLARATIONS OF CO-CONSPIRATOR MAY BE PROVED when uttered in furtherance of the common design: *McCaskey* v. *Graff*, 62 Am. Dec. 336; and see *Page* v. *Parker*, 80 Id. 172; *Benford* v. *Sanner*, 80 Id. 545.

DAVISON *v.* HOLDEN.

[55 CONNECTICUT, 103.]

VOLUNTARY ASSOCIATION — LIABILITY OF MEMBERS. — The defendants, with others, associated themselves under the name of the Bridgeport Co-operative Association, unincorporated, and established a retail meat market. Their purpose was to sell to any person who would buy, regardless of membership, and to the members at such a price as would relieve them from paying at least one middle-man's profit. No profits were anticipated beyond payment of the expenses of management. The members held meetings and elected officers, and the latter employed the defendants as managers to conduct the business. As such managers they bought and sold, paying the receipts to the treasurer. *Held*, that the individual members of the association were liable for goods sold to the association, upon request of the managers, although they never held themselves out as partners, or as being liable as individuals, for the obligations of the association.

ONE WHO BUYS BY AGENT BUYS BY HIMSELF, and the law imputes to him knowledge that he must pay, and the corresponding intent to pay, for what he owes.

CONNECTICUT GENERAL STATUTES, PAGE 417, SECTION 7, OF 1875, permit individuals to unite as a voluntary association, under a distinguishing associate name, for trading purposes, but they do not thereby acquire either corporate powers or immunity from individual liability.

UNDER CONNECTICUT STATUTE (Gen. Stats. 1875, p. 403, sec. 9), it is optional with creditor of a voluntary association to proceed against the association as such, or against the individual members composing it. In the former case, he can levy only on the property of the association; in the latter, execution will go against individual property.

ACTION for goods sold by the plaintiffs to the Bridgeport Co-operative Association. The defendants were Holden and one Tate, respectively president and treasurer of the association. The court below held that the defendants were not liable, either as copartners or as individuals. The plaintiffs appealed.

G. W. Wheeler and H. J. Curtis, for the appellant.

R. E. De Forest and F. W. Holden, for the appellees.

By Court, PARDEE, J. The defendants with sundry other persons associated themselves under the name of the Bridgeport Co-operative Association, an unincorporated trading association. They established a meat market. Their purpose was to buy at wholesale, and retail to any person who would buy, regardless of membership, and to the members at such a price as would relieve them from paying at least one middle-man's profit. Each member contributed something to the starting fund, the amount determined by himself. No profits were anticipated beyond payment of the expenses of manage-

ment. The members held meetings and elected officers; these employed managers to conduct the business; these last bought and sold, paying the receipts to the treasurer. One of the defendants was president, the other treasurer. Upon request of the managers the plaintiffs sold merchandise to the association; this suit is for the price thereof.

It did not otherwise appear than from the above facts that any of the members of the association ever held themselves out as partners, or as being liable as individuals, for the obligations of the association; or that the plaintiffs or any other persons ever gave credit to them, either as individuals or as partners; or that the members entered into any agreement of copartnership among themselves; or into any agreement or understanding by which they or any of them should become personally liable for the debts of the association. The defendants claimed that they were not liable either as individuals or as copartners.

The determination of the controversy as to the liability of the defendants depends not at all upon the question whether they and the other associated individuals were partners as between themselves; nor upon the question whether as between all the associates and strangers they were such; but upon the law of agency. If the defendants clothed an agent with unrestricted authority to buy, they must pay, regardless of the other questions.

Upon the record, the defendants, with others undisclosed, associated themselves for commercial purposes, for their pecuniary advantage. For convenience, they transacted business under an assumed associate name; sent their managers and agents into the market with unrestricted authority to buy goods and pledge their credit under that name; to buy for the benefit of all jointly and of each individually. In the due execution of the authority conferred upon them they contracted the debt in suit, and pledged the joint and several credit of the associates. As a matter of law, the plaintiffs, in giving credit to the associate name, gave credit to the individuals who upon inquiry should be found to stand behind it.

It is of no legal significance that the defendants did not intend to be individually responsible, or that they did not know or believe that as a matter of law they would be, or that they intended that the goods when bought should become the property of the association. Having given to the agent unrestricted authority to buy, their secret intent as to the ultimate

destination of the merchandise is of no avail. The rule that he who instructs his agent to buy can be made to pay stands quite independent of intent or knowledge; he who buys by an agent buys by himself, and the law imputes to him knowledge that he must pay, and the corresponding intent to pay, for what he buys.

The statute permits individuals to unite under a distinguishing associate name for trading purposes; but they do not thereby acquire either corporate powers or immunity from individual liability. If they choose so to do, they can institute a suit for the common benefit in the assumed name; also they may be made defendants under the same name. If the latter, execution will go against common property of the association as such, and not against individual property. If, disregarding the fact and form of association, the suit is against all of the individuals, execution will go against the individual property of any. A suit may be instituted against them as individuals, as at common law, if the plaintiff will take the risk of naming all, and of naming them correctly. If he names only a part of those who should be named, a plea in abatement may be interposed specifying omitted names; if no such plea is interposed, those who are named are properly sued, and must submit to judgment. If the associated persons send an agent into the market with unlimited authority to make purchases and contract debts in the name and for the benefit of the association, and the agent discloses the name of the association, and not the names of the individuals composing it, the creditor may, if he is content to look only to the property of the association as such for his security, institute his action against the association by its distinguishing name. If he desires to reach the individual property of members, he must institute his suit against such and so many of them as he can name, as individuals; he may do this even if the sale was made and the credit given in form to the association, and the name of no individual member was then known to him. He may do this for the reason that he gave credit upon the request of a known agent for an unknown principal. By operation of law, the credit was to the principal from the beginning, to be enforced whenever he can be discovered.

There is error in the judgment complained of.

VOLUNTARY ASSOCIATION, INDIVIDUAL LIABILITY OF MEMBERS: *Fredendall* v. *Taylor*, 99 Am. Dec. 203, and note 205; *Lewis* v. *Tilton*, 52 Am. Rep. 436; *Heath* v. *Goslin*, 50 Id. 505, and note 510.

HURLBUT *v.* THOMAS.

[55 CONNECTICUT, 181.]

IN ACTION ON JUDGMENT, IT IS NO DEFENSE that the defendant had no actual notice of the pendency of the suit in which the judgment was rendered.

JUDGMENT RENDERED IN ACCORDANCE WITH REQUIREMENTS OF LAW MUST STAND as a valid judgment, and is conclusive upon the parties, until set aside by some direct proceeding for the purpose.

DIRECT PROCEEDINGS FOR SETTING ASIDE JUDGMENT ARE, a petition for a new trial under the statute (Conn. Gen. Stat. 18⁷5, p. 447, sec. 1), a writ of error *coram nobis*, or, after the three years within which these proceedings must be brought, a suit in equity for relief against the judgment. The last-named remedy will not avail a party who has slept too long upon his rights.

ACTION upon a judgment. The facts appear in the opinion.

H. B. Graves, for the plaintiff.

W. Cothren, for the defendant.

By Court, BEARDSLEY, J. In the year 1873 a justice court in the town of Roxbury rendered judgment against the defendant in a suit brought by the plaintiff, and the present suit was brought to enforce the payment of that judgment. The defendant claims that the judgment is invalid, for the reason that personal service of the writ was not made upon him, and that he had no notice of the pendency of the suit until after the rendition of the judgment.

The record of the justice court shows affirmatively that both the plaintiff and defendant were inhabitants of this state when the writ was served, and that service was made by leaving a true and attested copy of it at the usual place of abode of the defendant; that the defendant was then absent from the state; that on the return day of the writ the defendant did not appear, and the justice adjourned the case for three months, at the expiration of which time he rendered judgment against the defendant by default.

The writ was served in the manner prescribed by the statute, the adjournment of the case for three months, though unnecessary, was within the discretion of the justice, and the judgment while in force is conclusive upon the parties: Gen. Stats., p. 101, sec. 3; *Grant* v. *Dalleber*, 11 Conn. 234; *Coit* v. *Haven*, 30 Id. 190; 79 Am. Dec. 244.

The defendant also asks, by way of equitable relief, that the plaintiff shall be restrained from enforcing the judgment. But the court below finds that no injustice was done the defendant by the judgment.

For the particular grievance of which the defendant complains,—namely, that judgment was rendered against him without his having received actual notice of the pendency of the suit,—the law furnished him ample remedy if he had chosen to avail himself of it. By statute (Gen. Stats., p. 447, sec. 1), he could have brought a petition for a new trial, or at common law a writ of error *coram nobis*, or after the three years within which these proceedings must be brought, he could have brought a suit in equity for relief against the judgment: *Jeffery* v. *Fitch*, 46 Conn. 601. He not only did not avail himself of either of the legal remedies within the time limited, but apparently has slept too long on his rights to be now heard in a court of equity. However that may be, he clearly cannot find a remedy by setting up in an action upon the judgment the mere fact that he failed to receive actual notice. The judgment, having been rendered in full accordance with the requirements of law, must stand as a valid judgment until set aside by some direct proceeding for the purpose.

The court of common pleas is advised to render judgment for the plaintiff.

ERRONEOUS JUDGMENT IS VALID UNTIL REVERSED, and protects plaintiff in enforcing it: *Peck* v. *McLean*, 1 Am. St. Rep. 665, and note 669.

IRREGULAR JUDGMENT CANNOT BE COLLATERALLY ATTACKED, but may be set aside on motion, or by some appropriate appellate proceeding: *Mitchell* v. *Aten*, 1 Am. St. Rep. 231, and note 234.

JUDGMENT, ACTION ON: *McEwan* v. *Zimmer*, 31 Am. Rep. 332; *National Bank* v. *Peabody*, 45 Id. 632; *Gebhard* v. *Garnier*, 23 Id. 721; *Taylor* v. *Shaw*, 2 Id. 478; defense to action on: *Savage* v. *Everman*, 10 Id. 676; *Bowler* v. *Huston*, 32 Id. 673.

COWLES *v.* PECK.

[55 CONNECTICUT, 251.]

DISTINCTION BETWEEN GUARANTY OF PAYMENT AND GUARANTY OF COLLECTION is, that the former is an absolute unconditional undertaking on the part of the guarantor that the maker will pay the note, while the latter is an undertaking to pay if payment cannot, by reasonable diligence, be obtained from the principal debtor.

GUARANTY OF NOTE IN THESE WORDS: "I guarantee the within note good till paid,"—is conditional, meaning that the note is capable of being collected by the use of ordinary diligence.

IT IS ESSENTIAL TO VALID CONTRACT OF GUARANTY OF NOTE that there be a sufficient legal consideration therefor.

ACTION on guaranty of a promissory note. The facts appear in the opinion.

E. F. Cole, for the appellant.

W. H. Williams, for the appellee.

By Court, LOOMIS, J. This is a complaint to recover upon a guaranty in writing signed by the defendant on the back of a note given August 3, 1878, by one Robert Peck, and payable to the order of David M. Cowles, the plaintiff's testator, since deceased. A demurrer to the complaint, which was sustained in the court below, raises two questions for our consideration:—

1. Was the guaranty an absolute or a conditional one? It was in these words: "I guarantee the within note good till paid."

The complaint is framed upon the assumption that it is an absolute guaranty of payment, that required no action on the part of the payee or the plaintiff, while the demurrer, on the other hand, assumes that the guaranty is conditional, and means that the note is capable of being collected by the use of ordinary diligence. We think the defendant's construction must be accepted as the true one.

All the authorities agree that there is a broad distinction between guaranties of payment and guaranties of collection. The former are an absolute unconditional undertaking on the part of the guarantor that the maker will pay the note, while the latter are an undertaking to pay if payment cannot by reasonable diligence be obtained from the principal debtor.

There is some disagreement in the authorities as to the precise steps to be taken by the holder of a conditional guaranty in order to subject the guarantor, but this distinction is of no importance in this case, inasmuch as the complaint in effect concedes that no steps whatever were taken to collect the note of the maker, and there is no averment that it was not a collectible note.

There has been no case before this court where the words of the guaranty were precisely like this. That of *Allen* v. *Rundle*, 50 Conn. 20, 47 Am. Rep. 599, comes nearest to it; but there the words were "good and collectible," and they were construed as constituting a conditional guaranty. We do not think the addition of the word "collectible" controlled that case, for the words "good" and "collectible" are of similar import when used in such connection.

The plaintiff, in support of his position, cited *City Savings Bank* v. *Hopson*, 53 Conn. 454, where the guaranty was in this form: "For value received, we guarantee the within note until paid,"—which was held to be a guaranty of payment. In view of this case, the plaintiff's counsel, with a suggestive play upon the words, asked: "How can the insertion of the word 'good' in a guaranty make it bad?" It cannot make it bad, but it may determine the class to which the guaranty belongs. Had the plaintiff used ordinary diligence in collecting the note of the maker, or shown that it was not collectible, he could have recovered, provided, of course, there was a good consideration. The simple question is, What does the word "good" in such a connection import?

It seems to us unnatural to give it all the force that attaches to the word "payment," for the latter refers to the act of the debtor alone, irrespective of any steps taken by the creditor, while the former word refers to and qualifies the note. The maker of a note may pay it when no one would have considered the note good; and on the other hand, a note may be considered perfectly good which the maker would not pay till compelled to do so. The accepted test of the goodness of a note is its capability of being collected independent of any voluntary act of payment on the part of the maker, and the use of ordinary diligence on the part of the holder is implied where diligence would avail.

In *City Savings Bank* v. *Hopson*, *supra*, there was no word to limit the extent of the guaranty, except the words "till paid." The court therefore considered the guaranty as belonging to the stronger class of absolute guaranties requiring actual payment, and the case was likened to that of *Breed* v. *Hillhouse*, 7 Conn. 523, where the word "payment" was used.

Our position receives strong confirmation from distinguished text-writers and from decisions in other jurisdictions.

In Edwards on Bills and Promissory Notes, side page 235, it is said: "'I warrant this note good' means that it is collectible, that the maker is responsible; it is not an engagement that the note will be promptly paid at maturity; and it is therefore incumbent on the holder of such note and guaranty, in order to charge the guarantor, to prove by legal evidence that the maker was not responsible." In 2 Daniel on Negotiable Instruments, section 1769, it is said: "The words, 'I guarantee the collection of the within note, and I promise that this note is good and collectible after due course of law,'

and 'I warrant this note good,' are phrases of similar import, binding the guarantor only upon condition that the guarantee acts with due diligence in prosecuting the collection of the note." In *Hammond* v. *Chamberlin*, 26 Vt. 406, "I hereby guarantee this note good until January 1, 1850," was held collateral, and not an absolute undertaking, and that the contract meant that the makers of the note should be in that condition that payment could be enforced against them if legal diligence was used for that purpose. In *Curtis* v. *Smallman*, 14 Wend. 231, a guaranty, "I warrant this note good," indorsed by the payee on the note, was held to be a guaranty that the note is collectible, and not that it will be paid on demand. In *Cooke* v. *Nathan*, 16 Barb. 342, it was held that a contract, "this note is good," meant that it could be collected by due course of law.

The case of *Koch* v. *Melhorn*, 25 Pa. St. 89, 64 Am. Dec. 685, has been cited by text-writers as opposed to the construction given above, and so far as we have noticed it is the only opposing case. It seems to us, however, that it is distinguishable from the cases cited. It was an action on a parol warranty of a note, where the words used were that the note was "just as good as if he would give him [the plaintiff] the money,—that he would insure it as good as gold and silver." It will be seen that the meaning did not depend on the word "good" alone; there is specially made an extra standard of the goodness intended; that is, it was just as good as if he would give him the money, which is actual payment; and when it was added, "as good as gold and silver," it referred to money in hand. Such language might well be held equivalent to a warranty of payment, as it was by that court.

The conclusion already reached amply sustains the judgment of the court below. It is therefore unnecessary to consider the other question relative to the consideration, but as our silence might imply that we consider the question doubtful, we will say that it is essential to a valid contract of guaranty that there be a sufficient legal consideration; and as in this case there is no consideration set forth, and none appears on the face of the guaranty, and there is no averment that it was executed contemporaneously with the note, or that the latter was accepted on the faith of it, and as no other fact appears from which a consideration may be legally presumed, we think the demurrer upon this ground also was well taken.

There was no error in the judgment complained of.

GUARANTY, CONTRACT OF, HOW CONSTRUED: *Mathews* v. *Phelps*, 1 Am. St. Rep. 581, and note 584; consideration: *Draper* v. *Snow*, 75 Am. Dec. 408, and note 413.

GUARANTY, CONTINUING: *Columbus Sewer-pipe Co.* v. *Ganser*, 55 Am. Rep. 697, and note 701; *Mathews* v. *Phelps*, 1 Am. St. Rep. 581.

IN THE CASE of *Lemmon* v. *Strong*, 55 Conn. 443, 446, a note on demand was guaranteed by an indorsement upon it as follows: "I hereby warrant the within note good and collectible until paid." It was held, citing the principal case, that the guaranty was conditional, and not absolute, requiring due diligence for the collection of the note. See also *Allen* v. *Rundle*, 50 Id. 9; 47 Am. Rep. 599.

WELLES *v.* BAILEY.

[55 CONNECTICUT, 292.]

TITLE OF RIPARIAN OWNER OF LAND ON RIVER EXTENDS to the middle of the stream if it is non-navigable, and to the line of high water if navigable.

RIPARIAN OWNER TAKES ALL ACCRETIONS from the gradual change of a river-bed; and this principle applies where land, though not originally riparian, becomes so when the river reaches it by gradually washing away all the intervening land. The remoter land then becomes riparian as much as if it had been originally such, and all the incidents of riparian land attach thereto.

WHEN PORTION OF RIPARIAN LAND IS WASHED AWAY BY STREAM, riparian owner becomes entitled to the land under the water so far as the center of the stream, if non-navigable, without reference to the original limit of his land or to his upland lines. He takes whatever front upon the stream its change of bed gives him, and by lines that run from the termini of his upland lines at right angles to the center line of the stream; and the same rule applies in the case of navigable waters, the lines to low-water mark being extended on the same principle.

APPLICATION, IN CIRCUMSTANCES SOMEWHAT PECULIAR, of the principle of accretion and reliction, growing out of changes in the bed of the Connecticut River.

ACTION for entering upon and cutting and removing growing wood from land claimed by the plaintiff. The facts appear in the opinion.

R. Welles and S. W. Adams, for the appellants.

C. E. Perkins and W. S. Goslee, for the appellee.

By Court, LOOMIS, J. This case involves the application, in circumstances somewhat peculiar, of the principle of accretion and reliction, growing out of changes in the bed of the Connecticut River.

About the year 1700 the Connecticut River, between the towns of Whethersfield and Glastonbury, flowed at a certain point in two channels, with an island known as Wright's

Island between them. By the year 1770 the east channel had been left by the river, which now ran wholly in the west channel. The land left by this reliction in the east channel passed into private ownership (the history of the matter being unimportant), and in the year 1802 Samuel Welles, the ancestor of the plaintiff, acquired by purchase a strip in the old channel containing about four acres, bounded west upon its center line, east upon sundry former riparian proprietors, and south on a part of a lot known as the Benton lot, and which is now owned by the defendants. There was no northern limit of this lot given by the deed, but it was described as bounded "north by bounds unknown." It in fact extended on the north to the line of the river, which by a gradual change of its bed was working to the southward and eastward, and beginning to encroach upon the lot at that end.

By a gradual change of its bed, the river has made a sweeping curve, until in 1885, when the present suit was brought, it had worked its way through the entire Welles lot, and a large part of the Benton lot south of it, replacing on its other side by alluvial deposit the Welles lot, and a large part of what was the Benton lot, leaving between the Welles lot and the present channel a quantity of land within the original limits of the Benton lot. The question that arises in the case is as to the right to that part of the original Benton lot which now lies between the Welles lot and the river, but entirely on the other side of the river from that on which it originally lay.

As the river changed its bed to the eastward and southward it encroached, as has been stated, upon the Welles lot, which had originally reached it at its north end, until its whole width was within that lot; and before the south end of it had disappeared the north end had begun to emerge on the west side of the river, which by its bend was now running at this place in a southwesterly direction; and when the southern end of the lot was washed away and the Benton lot began to be encroached upon, a considerable part of the Welles lot, so far as original boundaries are concerned, had been restored on the west side of the river. Precisely what would be the right of the original owner to this restored land as between himself and other proprietors who might claim it by accretion, it is not necessary for us to consider, for it is conceded that the plaintiff, and those under whom he claims, have been for a long time in possession of this restored land, and hold an undisputed title to it.

It is not necessary for us, in our inquiry into the rights of the parties, to consider whether the Connecticut River is at this point in law a navigable or non-navigable river. It is in constant use for purposes of navigation, and the tide slightly ebbs and flows there, which would seem to make it at common law a navigable river, and especially would it be so under the rule generally adopted in the states of the Union, though never formally adopted in this state, that rivers that are navigable in fact are so in law. The only difference between the rights of riparian owners in the one case and the other is, that in a non-navigable river the title of the riparian proprietors extends to the middle of the stream, while in navigable rivers it extends only to the line of high-water, with certain rights extending to low-water mark. The law of accretion and reliction, which is the only law we are called upon to consider, is precisely the same in both cases: Gould on Waters, sec. 162.

It is claimed on the part of the plaintiff that as the Welles lot, now on the west side of the river, was increased by constant accession at its southern extremity, all this accretion belonged to this lot, not merely until its original limit was reached, but, regardless of all ancient boundaries and of all original rights, that it continued to follow the receding river, taking, as a riparian lot, whatever the river deposited in its front; it being found by the court below that the change in the river-bed was entirely by gradual accretion and reliction.

The defendants admit the general principle by which a riparian owner takes all accretions from the gradual change of a river-bed, but contend that that principle is not applicable to the peculiar circumstances of the present case. We will notice in their order the claims which they make with regard to the matter.

They say, in the first place, that the law of accretion applies only to the case of riparian land, and that as the plaintiff's lot did not originally bound upon the river, but was conveyed to him by distinct lines and boundaries, at least upon the sides affected by the present question, it cannot become by any changes of the river riparian land.

We cannot accede to this claim. If a particular tract was entirely cut off from a river by an intervening tract, and that intervening tract should be gradually washed away until the remoter tract was reached by the river, the latter tract would become riparian as much as if it had been originally such. This follows necessarily from the ordinary application of the

principle. All original lines submerged by the river have ceased to exist; the river is itself a natural boundary, and every changing condition of the river in relation to adjoining lands is treated as a natural relation, and is not affected in any manner by the relations of the river and the land at any former period. If after washing away the intervening lot it should encroach upon the remoter lot, and should then begin to change its movement in the other direction, gradually restoring what it had taken from the remoter lot, and finally all that it had taken from the intervening lot, the whole, by the law of accretion, would belong to the remoter but now proximate lot. Having become riparian, it has all riparian rights. This general principle is recognized by all the text-writers, and by numerous decisions of the English and American courts. The river boundary is treated in all cases as a natural boundary, and the rights of the parties as changing with the change of its bed.

The defendants claim, in the next place, that though a riparian owner may take by accretion to the middle of a stream, or in the case of a navigable river to high-water mark, yet that that being the limit of his original title, and in the case of a non-navigable river the line of the adjoining owner, he cannot take such accretions beyond that line. This claim is utterly without support. The dividing line between the owners of the opposite sides of a non-navigable river is the middle of the river, but that middle line is merely an imaginary one, and changes with every change in the bed of the stream. Thus in Gould on Waters, section 159, it is said that "if an unnavigable stream, in which the title of the riparian owner extends *ad filum aquæ*, slowly and imperceptibly changes its course, the boundary line is the center of the new channel." And numerous cases are cited in support of the position.

The final claim of the defendants, which is substantially involved in the claim last considered, is that as the part of the plaintiff's land which was last left by the receding stream was an upland corner made by two converging lines, the plaintiff was entitled to no more than the restoration of this corner after it had been washed away, leaving all beyond to accrue to the Benton lot, from which it was originally taken.

So far as this claim is founded upon the fact that this corner was originally upland and not riparian, we have already considered and disposed of it. It is only as the corner has

become submerged and afterwards restored on the other side of the river that the claim presents any matter for further consideration. The defendants' idea, as we understand it, seems to be that the right of a riparian owner is like the right of an owner of land upon a highway. The latter owns to the middle of the highway, upon the theory that the highway was originally taken out of the adjoining land, and on this ground it reverts to the original owners if the highway is discontinued. The claim of the defendants seems to be that the right of a riparian owner extends under the water on his upland lines in the same manner, and that those lines are decisive of his rights in case of a recession of the river. But the two cases have nothing in common. They rest upon entirely different theories. The riparian owner takes the land under the stream because the stream is a natural boundary, and not because the land was once his. Whenever a portion of a riparian lot is washed away by the river, the riparian owner becomes entitled to the land under the water as far as the center of the stream, without any reference to the original limit of his land or to his upland lines. He takes whatever front upon the river its change of bed gives him, and by lines that run from the termini of his upland lines at right angles to the center line of the stream. We are speaking now of non-navigable rivers, but the same rule applies in the case of navigable waters, the lines to low-water mark being extended on the same principle. All the authorities agree in this. Thus in Gould on Waters, section 162, it is said that "every proprietor is entitled to frontage of the same width on the new shore as on the old shore, and at low-water mark as at high-water mark, without regard to the side lines of the upland. . . . . In general, the lines of division are to be made to the channel in the most direct course from the lateral boundaries of the several tracts of upland to which the flats are appended. . . . . So, also, in the case of unnavigable streams, which are the property of the riparian proprietors *usque ad filum aquæ*, the side lines are extended to the center of the stream from the termini on the bank, at right angles with the general course of the river." Numerous authorities are cited in support of these positions.

It necessarily follows from this reasoning, that the land of the plaintiff took by accretion all that lay between its river front on the west side of the river and the receding bed of the river, and within lines drawn from the termini of its side lines

at right angles to the channel of the river. And within these lines falls the land in dispute.

As the view we have taken disposes of the case, it is not necessary that we should consider the question, presented by the record, with regard to the rights acquired by the plaintiff by adverse possession.

There is no error in the judgment of the superior court.

WATERCOURSES, title and rights of riparian proprietor: *Ryan* v. *Brown*, 100 Am. Dec. 154, and cases in note 161; *Stover* v. *Jack*, 100 Id. 566, and note 569; *Hogg* v. *Beerman*, 52 Am. Rep. 71; *Trustees* v. *Schroll*, 60 Id. 575; *Mabry* v. *Norton*, 53 Id. 206, and extended note 215; *Union Depot etc.* v. *Brunswick*, 47 Id. 789.

ACCRETION, rule for apportionment among riparian owners: *Kehr* v. *Snyder*, 55 Am. Rep. 866; *Batchelder* v. *Keniston*, 12 Id. 143.

ACCRETIONS, when riparian owner is entitled to: *Cook* v. *Burlington*, 6 Am. Rep. 649; *Livingston* v. *County of St. Clair*, 16 Id. 516, and note 524; when not entitled to: *Cook* v. *McClure*, 17 Id. 270.

FARMERS' LOAN AND TRUST COMPANY *v.* POSTAL TELEGRAPH COMPANY.

[55 CONNECTICUT, 334.]

PROCEEDINGS TO FORECLOSE MORTGAGE IN COURTS OF STATE OF NEW YORK upon lands in Connecticut are without validity, and do not affect the right to a foreclosure of the mortgage according to the laws of the latter state.

COURTS OF EACH STATE HAVE EXCLUSIVE JURISDICTION to settle the title to lands within the limits of the state.

SUIT to foreclose a mortgage. The facts appear in the opinion.

G. E. Terry, for the appellants.

F. E. Hyde, for the appellee.

By Court, CARPENTER, J. The Postal Telegraph Company, a New York corporation, mortgaged all its property, which was situated in several states, including Connecticut and New York, to the plaintiffs, in trust, to secure the payment of its bonds. Upon a failure to pay the interest, the plaintiffs brought a suit for a foreclosure in the supreme court in the city of New York. Judgment was rendered for the plaintiffs, pursuant to which a referee was appointed, who sold all the property, including the real estate in this state, and executed a conveyance of the same to the purchaser. The present suit

is brought to foreclose the mortgage on property in this jurisdiction, according to the law and practice of this state.

The Benedict and Burnham Manufacturing Company, one of the defendants, an attaching creditor, appeared and set up a special defense, alleging the foreclosure and proceedings in the state of New York. That defense was demurred to, and the demurrer sustained. The defendant appealed.

The question is not one of jurisdiction, as the defendant assumes; for the jurisdiction of the court in New York over the parties and the subject-matter of the suit, so far as the property in that state is concerned, cannot be questioned. But the question is, What effect had that judgment on the real estate in Connecticut? Or, if it is preferred to state it as a jurisdictional question, have the courts of that state jurisdiction over lands and land titles in this state? The validity of the defense depends upon the answer to this question. If the result was to convey to and vest in the purchaser the title to that real estate, then the mortgage had performed its office before this suit was brought, and the plaintiffs have no title, equitable or otherwise. But if those proceedings were nugatory as to that state, then the mortgage is in force, and the plaintiffs are entitled to a foreclosure.

We think the latter is the better view. The courts of our state will not recognize the right of courts in other states to affect directly the title to real estate in the former. The most that can be done is to allow foreign courts having jurisdiction of the parties to compel conveyances by the owner, and recognize as valid titles so acquired. We are aware of no case that has gone so far as to recognize the validity of a deed given by a referee or other officer of court by authority of law in another jurisdiction. The rule seems to be that the courts of each state have exclusive jurisdiction to settle the title to lands within its own limits.

In *Watkins* v. *Holman*, 16 Pet. 25, McLean, J., in speaking for the supreme court of the United States, says: "A court of chancery, acting *in personam*, may well decree the conveyance of land in any other state, and may enforce their decree by process against the defendant. But neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court." In *Booth* v. *Clark*, 17 How. 322, the same court says, speaking of a receiver appointed under a creditor's bill: "He has no extraterritorial power of official

action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property."

It follows that as to real property in this state the rights of the parties remain as they were, unaffected by legal proceedings in the state of New York.

There is no error in the judgment complained of.

EQUITABLE JURISDICTION TO DEAL WITH LAND BEYOND STATE: *Piedmont Coal etc. Co.* v. *Green*, 98 Am. Dec. 799, and see note 803; *Burnley* v. *Stevenson*, 15 Am. Rep. 621.

FOREIGN COURT CANNOT BY ITS JUDGMENT PASS TITLE TO LAND situate in another country: *Page* v. *McKee*, 96 Am. Dec. 201, and note 205.

CHADEAYNE *v.* ROBINSON.

[55 CONNECTICUT, 345.]

SURFACE WATER MAY BE OBSTRUCTED IN ITS FLOW BY OWNER OF LAND OVER WHICH IT FLOWS, although the effect is to set the water back upon adjoining land next above him; and the case is not affected by the fact that the obstruction consists of a tight board fence built in part on a portion of the division line, which, by the agreement of the parties, was to have been fenced by the adjoining owner.

ACTION for obstructing the flow of surface water. The facts appear in the opinion.

E. Zacher and J. P. Thompson, for the appellants.

W. C. Chase and W. H. Ely, for the appellees.

By Court, PARDEE, J. This is a complaint for obstructing the passage of surface water flowing upon the defendants' land, whereby it was set back upon the land of the plaintiffs. Judgment was rendered for the defendants, and the plaintiffs have appealed. The following are the reasons of appeal assigned:—

1. That the court erred in ruling as a matter of law, upon the facts found, that there was *damnum absque injuria*, and that therefore the plaintiffs were not entitled to recover damages.

2. The court, having found that the course of the surface water, coming from the lands south of the plaintiffs' and flowing across their land, was thence upon the defendants' land, and that the defendants constructed their fence two or three feet beyond the point of division and upon the plaintiffs' line, and that the agreed place of dividing said divisional fence was at

or very near the place where the greater quantity of water was accustomed to flow from the plaintiffs' to the defendants' land, and the defendants' divisional fence constituted the substantial obstruction to its flow, and that except for the erection of said fence by the defendants the damage to the plaintiffs would not have occurred, and that material damage was done to and in the house of the plaintiffs by said divisional fence stopping the water, erred in ruling that, as a matter of law, the plaintiffs were not entitled to damages.

The parties are severally owners of adjoining village lots, with a house upon each. Except for the intervention of man, surface water would run from the plaintiffs' lot upon that of the defendants. They made an agreement as to the portion of division fence to be built and maintained by each. The defendants built a tight board fence two or three feet longer than the agreement required from them for the purpose of closing an opening left by the plaintiffs. The agreed place of division of the fence was at or near the place where the greatest part of the surface water flowed, and the defendants' fence prevented the usual flow and ponded the water on the plaintiffs' land, to their material damage.

The general common-law rule in reference to surface water is that stated in Gould on Waters, section 267, as follows: "The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface, or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated, with reference to that of adjoining owners, that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface, or flowing onto it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow.

This rule was accepted as the law by this court in *Grant* v. *Allen*, 41 Conn. 156; the court there saying that "the right of the owner of land to determine the manner in which he will use it, or the mode in which he will enjoy it, the same being lawful, is too high in character to be affected by considerations growing out of the retention, diversion, or repulsion of mere surface water, the result of falling rain or melting snow."

Under that rule, it is the right of the defendants to erect for

the entire depth of their lot a structure which will be a perfect barrier to surface water. Of course that which they may do perfectly and permanently they may do imperfectly and temporarily; and the plaintiffs must accept the consequences. And this rule is neither suspended nor modified in the present case by the agreement as to the portion of fence to be constructed by each. That agreement was not intended, and is not by either party to be interpreted, as a permanent quitclaim by the other of the right to improve his property to the fullest extent.

There is no error in the judgment complained of.

SURFACE WATER, RIGHT OF LAND-OWNER TO OBSTRUCT FLOW OF FROM ADJOINING PREMISES: *Franklin* v. *Fisk*, 90 Am. Dec. 194, and note 195; *Swett* v. *Cutts*, 9 Am. Rep. 276, and note 284; *Tootle* v. *Clifton*, 10 Id. 732; *Gibbs* v. *Williams*, 37 Id. 241.

BEECHER *v.* BALDWIN.

[55 CONNECTICUT, 419.]

IN ACTIONS ON COVENANTS AGAINST ENCUMBRANCES, PLAINTIFF IS ENTITLED to the actual damage sustained by the breach of the covenant. If evicted, and there is a total failure of consideration, he will recover the value of the land at the time of eviction, if he has paid the purchase-money. If the purchase-money has been partly paid, he will recover the amount with interest, not exceeding the value of the land. The consideration having been paid, if the purchaser removes the encumbrance, the damages are the amount paid for that purpose, not exceeding the value of the land. But if the purchaser has paid nothing towards the removal of the encumbrance, and is not evicted, he will recover only nominal damages.

COVENANT OF WARRANTY, NOMINAL DAMAGES FOR BREACH OF.—The defendants owned land which was heavily mortgaged to Yale College. They sold a part of it, subject to the mortgage, to the plaintiff, it being understood that the mortgage was to be removed, so as to give the plaintiff a clean title. The plaintiff paid a small part of the purchase-money, received a warranty deed, with a covenant against encumbrances, and gave notes and a mortgage back for the balance of the purchase-money, the college agreeing to quitclaim its interest in the premises to the plaintiff in consideration that the purchase-money, when paid, be applied to the payment of its mortgage. The plaintiff failed to pay the notes, and the college foreclosed its mortgage and evicted the plaintiff. At this time the property had depreciated in value, and was worth much less than the unpaid portion of the purchase-money. In this action by the plaintiff on the covenants of warranty and against encumbrances, *held*, that the plaintiff was entitled to recover at most but nominal damages, but as the defendants had pleaded a set-off of the notes given for the purchase-money, there could be no recovery on the part of the plaintiff.

IN ACTION FOR BREACH OF COVENANT OF WARRANTY IN DEED, NOTES GIVEN FOR PURCHASE-MONEY CONSTITUTE a proper equitable set-off, which may be pleaded as such, although the notes, as an independent cause of action, are barred by the statute of limitations.

ACTION upon the covenants in a deed of real estate. The opinion states the facts.

T. E. Doolittle, E. H. Rogers, and J. G. Clark, for the plaintiffs.

C. R. Ingersoll and W. B. Stoddard, for the defendants.

By Court, CARPENTER, J. The facts of this case, stripped of immaterial matters, may be briefly stated. The defendants were the owners of some real estate which was heavily mortgaged to Yale College. They sold a portion of it, subject to the mortgage, to the plaintiff, for twelve thousand five hundred dollars. It was understood that the mortgage was to be removed from that portion sold to the plaintiff, so that she was to have a clean title. The transaction, however, took another form. In March, 1873, the plaintiff paid two thousand five hundred dollars of the purchase-money, received a warranty deed of the premises, containing the usual covenants, and mortgaged the same premises to the defendants to secure the balance of the purchase-money. It was arranged between the college and the defendants that the purchase-money, when paid, was to be applied in part payment of the encumbrance, and that the college was to quitclaim its interest in the premises to the plaintiff. The plaintiff knew of the encumbrance at the time, and of the arrangement by which it was to be extinguished. She failed to pay the balance of the purchase-money; consequently the encumbrance was not removed, and she did not acquire a complete title.

Yale College, at the instance of one of the defendants, foreclosed its mortgage, the foreclosure taking effect early in May, 1878, and evicted the plaintiff. The property at that time was worth but six thousand five hundred dollars, being several thousand dollars less than the unpaid portion of the purchase-money. The plaintiff declined to pay her notes, stating that she "should be obliged to give up the land, and lose what she had paid."

In February, 1885, this suit was brought. The complaint is in four counts. A demurrer was filed, which was sustained as to the first and second counts, and overruled as to the third

and fourth. The answer to the third and fourth counts denied the material allegations of the complaint. The defendants also pleaded a set-off, and filed a cross-complaint.

The third count is on the covenant against encumbrances, and the fourth is on the covenant of warranty. The plaintiff claims that she is entitled to a judgment on either count at her election; the defendants claim that she is entitled to recover on neither.

In actions on the covenant against encumbrances, the court will endeavor to give to the plaintiff the actual damage sustained by the breach of the covenant. If the plaintiff is evicted, and there is thereby a total failure of consideration, he will recover the value of the land at the time of the eviction, provided he has paid the purchase-money. If the purchase-money has been partially paid, he will recover the amount paid, with interest, not exceeding, however, the value of the land. The consideration having been paid, if the purchaser removes the encumbrance, the rule of damages is the amount paid for that purpose, not exceeding the value of the land. If the purchaser pays nothing towards the removal of the encumbrance, and is not evicted, he will recover only nominal damages.

These are the general rules; in applying them, however, care will be taken in each case to do no injustice to either party. The leading principle is to give effect to the real intention of the parties. Both parties intend that the title shall vest in the purchaser. If the value increases, he has the benefit of it; if it decreases, he bears the loss. To secure to him the one and subject him to the other, the rule has been adopted to limit the damages by the value of the land at the time of the eviction. Thus it will sometimes happen that he will recover more than the consideration paid, and sometimes less. To give the seller the benefit of an increased value, or to require him to bear the loss of a depreciation, would be a perversion of the fundamental principle on which the rule rests.

In the present case, if the plaintiff recovers on the third count the consideration paid by her, she loses nothing by the transaction. Although the premises depreciated in value nearly one half, yet the whole loss falls upon the defendants. That cannot be as the parties intended it. On the other hand, suppose the property had increased in value fifty per cent or more; the plaintiff then could have paid her notes, and had the benefit of the enhanced value. We know of no method by

which the defendants could legally have deprived her of that privilege. If now it is so that she can with the aid of the court compel the defendants to bear the loss, there must be some defect either in the law or in its administration.

If the plaintiff had paid the consideration, the encumbrance would have been removed, and she would have had a clean title according to her contract. That is precisely what the parties intended. It was not contemplated that the encumbrance would be removed in any other manner or by any other means. If she had paid, and the defendants had removed the encumbrance, her loss doubtless would have been greater than it now is; and yet in this action she could have recovered only nominal damages. In that case, it would have been very clear that her damage resulted, not from the breach of the covenant, but from the depreciation in the value of real estate.

By the original contract the plaintiff purchased and the defendant sold the premises as though they were free from encumbrance. The contract provided that the purchase-money should be paid and the encumbrance removed when the deed should be given. But the plaintiff being unable to pay the purchase-money, a change was made in the form of the transaction only, — a change wholly for her benefit. In substance, it was still a sale of the land, — the whole title, and not merely an equity of redemption. The purchase-money was to be used for the double purpose of extinguishing the mortgage to Yale College and the plaintiff's mortgage to the defendants. It was wholly her fault that it was not so used. It resulted from her failure to perform her agreement. She deliberately violated her contract, and now seeks to take advantage of her own wrong to the prejudice of the defendants. Having wronged them once, she now virtually insists that she has thereby acquired a right to inflict upon them a further wrong.

Suppose the transaction had been in form what it really was in substance, — a sale of an unencumbered piece of land for twelve thousand five hundred dollars. The purchaser paid two thousand five hundred dollars, and gave her note for ten thousand dollars, secured by a mortgage of the same premises. After three or four years the property so far depreciated in value that it was worth much less than the mortgage on it, — so much less that it was more advantageous for the purchaser to forfeit the amount already paid than to pay the balance. Now, let us further suppose that the purchaser in this state of

things makes a claim on the seller for the amount of the purchase-money actually paid, with interest; would a court of justice seriously entertain such a preposterous claim? And yet that is virtually the claim presented and strenuously urged in this case. The only difference is, that in this case the form of the transaction gives the plaintiff a naked right of action; but it rests on the purest technics, being entirely destitute of merit. The plaintiff therefore is entitled to recover at most but nominal damages.

But the plaintiff is not entitled to recover even nominal damages. The defendants plead a set-off of the notes given for the purchase-money, amounting to about ten thousand dollars. One thing may be noticed in this connection with respect to these notes. They are either valid subsisting notes, or they are not. If not, they are not collectible, and would not ordinarily be the subject of a set-off; if valid, or if for the purposes of this case they are to be treated as valid, they may be set off. It is unnecessary to consider to what extent they are collectible by the defendants; for the plaintiff, in claiming to recover substantial damages, proceeds upon the theory that she may require the defendants to make their deed good. If she may, she thereby becomes obligated to pay her notes. As the set-off assumes the validity of the notes, the defendants thereby impliedly admit their liability on their covenants. In discussing the matter of set-off, we shall assume the liability of both parties, — the defendants on their covenant, and the plaintiff on her notes.

As the plaintiff in no event can recover to exceed six thousand five hundred dollars and interest, and the notes amount to a much larger sum than that, the set-off is an answer to the plaintiff's demand, unless the notes are barred by the statute of limitations.

The statute provides for a set-off of mutual debts. Mutual debts growing out of the same subject-matter have been set off, aside from the statute, especially in equity. The statute allows all such debts to be set off at law, and extends the equitable principle to independent debts, or debts growing out of different transactions. A set-off under the statute was refused by this court in *Alsop* v. *Nichols*, 9 Conn. 357, where the debt claimed to be set off was barred by the statute of limitations.

By statute, the defendant may recover a balance, if his claim is greater than the plaintiff's; but no recovery can be had if the debt is barred.

In *Avery* v. *Brown*, 31 Conn. 398, the court makes a clear distinction between independent debts and debts growing out of the same transaction. The former, if mutual, are proper subjects of set-off under the statute. The latter may be applied in reduction of the plaintiff's demand, without the aid of the statute. In this case, there would be difficulty in applying the statute and allowing the defendant to recover a balance; but as these claims arose in the same transaction, and are so connected that one is the consideration for the other, there can be no difficulty in allowing the one to be used in reduction of the other. In *Avery* v. *Brown*, 31 Conn. 401, this court said: "The policy of the law is always to prevent unnecessary litigation, and where in a pending suit entire justice can be done to both of the parties before the court by the ascertainment and set-off of their mutual claims against each other without a violation of any of the settled rules or forms of law, such set-off ought always to be made." The court also quotes approvingly from Parsons on Contracts, as follows: "A defendant may deduct from the plaintiff's claim all just demands or claims owned by him in the very same transaction, or even in other but closely connected transactions."

Applying the unpaid portion of the purchase-money in reduction of the plaintiff's demand is but an application of the principle that if the grantee fails to pay the purchase-money, the real consideration for the deed, he is not entitled to recover in an action on the covenants in the deed,—certainly no more than nominal damages. To such a claim, when offered in common speech as a set-off, but more accurately speaking by way of recoupment, the statute of limitations has no application.

"Not only does the bringing of an action stop the operation of the statute as to a proper matter of set-off, but it also seems that it revives a claim which is actually barred out, which is the proper subject of recoupment in the action, as damages growing out of the same transaction": Wood's Limitation of Actions, 602. "Where there are cross-demands between parties, which accrued nearly at the same time, both of which would be barred by the statute, and the plaintiff has saved the statute by suing out process, but the defendant has not, the defendant may nevertheless set off his demand": Angell on Limitations, sec. 75.

It seems clear, therefore, that if substantial damages are

recoverable, the notes as a set-off or recoupment are a complete defense; and they are equally a defense if only nominal damages are recoverable. Each party broke the contract, and each party is technically liable to the other. One demand may well offset the other, so that neither can recover.

Under the covenant of warranty the plaintiff claims that she is entitled to recover the value of the land at the time of the eviction. That would be the extent of her recovery if she had paid the purchase-money. That being unpaid, it would seem that she would be entitled to recover much less. But however that may be, even if we concede her claim as made, the set-off answers it fully.

The reasons given against a recovery on the third count are equally applicable to the fourth. The difficulty with the plaintiff's whole case is, that by the real contract between the parties, in equity at least, the eviction was the necessary consequence of her failure to pay the purchase-money; and that whatever loss she sustained resulted, not from the breach of the covenants, but from the depreciation in the value of the estate purchased.

The superior court is advised to render judgment for the defendants.

MEASURE OF DAMAGES FOR BREACH OF COVENANT AGAINST ENCUMBRANCES: *Grant* v. *Tallman*, 75 Am. Dec. 384; *Kelsey* v. *Remer*, 21 Am. Rep. 638; *Guthrie* v. *Russell*, 26 Id. 135.

SET-OFF, IN WHAT CASES ALLOWED: *Smith* v. *Washington Gaslight Co.*, 100 Am. Dec. 49, and note 52; *Patterson* v. *Patterson*, 17 Am. Rep. 384.

SET-OFF MAY BE BARRED BY LIMITATION: *Nolin* v. *Blackwell*, 86 Am. Dec. 206.

STATUTE OF LIMITATIONS AGAINST COUNTERCLAIM OR RECOUPMENT. — The statute of limitations applies as well to a demand attempted to be set off as to one upon which an action is brought: *Nolin* v. *Blackwell*, 31 N. J. L. 170; 86 Am. Dec. 206; *Harwell* v. *Steele*, 17 Ala. 372. A claim which is barred by the statute is not therefore available as a set-off or counterclaim: *De Lavalette* v. *Wendt*, 75 N. Y. 579; 31 Am. Rep. 494; *Lyon* v. *Petty*, 65 Cal. 322; *Taylor* v. *Gould*, 57 Pa. St. 152; *Trimyer* v. *Pollard*, 5 Gratt. 460. If, however, a counterclaim or set-off be not barred at the commencement of the action in which it is pleaded, it does not become so afterward, during the pendency of that action: *Brumble* v. *Brown*, 71 N. C. 513; *Stillwell* v. *Bertrand*, 22 Ark. 375; *McElhwig* v. *James*, 36 Ohio St. 152; *Walker* v. *Clements*, 15 Q. B., N. S., 1046; *Dunn* v. *Bell*, 85 Tenn. 582; *Williams* v. *Lenoir*, 55 Id. 395. And it is held that, in pleading the statute of limitations to a counterclaim, it must be shown that the bar of the statute had matured when the original suit was commenced, and it is not sufficient to aver a bar when the counterclaim was filed: *Eve* v. *Louis*, 91 Ind. 457. But in Pennsylvania, if the defendant pleads a set-off, the time when the running of the statute is

stopped is when he pleads or gives notice to the plaintiff, and not when the action is commenced: *Gilmore* v. *Reed*, 76 Pa. St. 462; *McClure* v. *McClure*, 1 Grant Cas. 222. Under the Iowa code, a counterclaim barred by the statute of limitations may be pleaded, if it was the property of the party pleading it when it became barred, and if it was not barred when the claim sued on originated: *Allen* v. *Maddox*, 40 Iowa, 124; *Folsom* v. *Winch*, 63 Id. 477.

In addition to the authorities cited in the principal case, in support of the doctrine that the bringing of an action may operate to revive a claim which is actually barred out by the statute of limitations, and which is the proper subject of recoupment in the action, see *King* v. *King*, 9 N. J. Eq. 44; *Morrow* v. *Hanson*, 9 Ga. 398; *Riddle* v. *Kreinbeihl*, 12 La. Ann. 297; *Evans* v. *Yongue*, 8 Rich. 113.

CHASE *v.* TUTTLE.

[55 CONNECTICUT, 455.]

ASSIGNMENT FOR BENEFIT OF CREDITORS, MADE BY MAJORITY OF DIRECTORS of a corporation, constituting a legal quorum, is not invalid because two of the directors, being out of the state at the time, failed to receive actual notice of the meeting.

CONNECTICUT ACT OF 1876, WHICH PROVIDES that any one of the directors or executive officers of a corporation owning stock in another corporation may be elected a director of the latter, was not repealed by the joint-stock act of 1880, providing that the affairs of every joint-stock association shall be managed by three or more directors, "who shall be stockholders in the corporation"; and the executive officer or chief manager of a corporation, which holds stock in another corporation, is a "stockholder" within the meaning of the two acts.

CORPORATION — NOTICE OF DIRECTORS' MEETING. — The record of the meeting of directors, at which an assignment for the benefit of creditors was made, ran as follows: "At a special meeting of the directors, called for the purpose of making an assignment for the benefit of all the creditors, pursuant to the statutes," etc.: *held*, that, upon this record, until the contrary was shown, it would be presumed that the purpose of the meeting was specified in the notice sent to the respective directors.

ACTION of replevin. The facts appear in the opinion.

C. R. Ingersoll, S. W. Kellogg, and J. P. Kellogg, for the plaintiffs.

J. S. Beach and G. C. Lay, for the defendants.

By Court, LOOMIS, J. This is an action of replevin, brought by the trustees of Brown and Brothers, an insolvent corporation, for certain goods that were on the 4th of January, 1886, attached by the defendant as a deputy sheriff, on the suit of the National Shoe and Leather Bank of New York against the corporation. On the evening of the same day, an assignment

for the benefit of all the creditors of the corporation was made, pursuant to a vote of a majority of its directors, as is claimed, which was lodged on file in the probate court, and subsequently accepted, approved, and recorded by that court, and the plaintiffs were appointed and qualified as trustees. The sole defense against this action is, that the assignment was invalid and of no effect.

The claimed illegality of the assignment is based upon three objections only: 1. That two of the five directors, being out of the state at the time, did not receive any notice of the meeting; 2. That of the three persons who acted as directors in the matter in question, one, namely, Henry R. Coit, was not legally a director, though chosen as such, because he was not a stockholder of Brown and Brothers; 3. That the notices of the meeting sent to the directors did not specify the object of the meeting, as required by statute.

1. We do not think the assignment invalid for want of actual notice to the two directors who were at the time absent from the state. Notice was sent by telegram to them, as to the others, at their address in this state, but one being in the territory of Montana, and the other in South Carolina, they failed to receive the notices. Under these circumstances, it would seem unreasonable to hold that a majority of the whole number, being present, could not do a legal act binding the corporation. The exigency demanded immediate action to save the property and to save expense. It is easy to see how disastrous might be the consequences were we to adopt the principle contended for by the defendants. The situation of the absent directors might be much more remote and inaccessible than in the present case, requiring several months to reach them by actual notice. Must the corporation remain paralyzed all this time, without ability to protect itself?

But the suggestion was made in the argument in behalf of the defendants that it might be treated as a case of vacancy, which the remaining directors could fill, pursuant to the act of 1880: Sess. Laws 1880, p. 561, sec. 7. If, however, the office was vacant as to the two absent directors, then surely the remaining directors could lawfully represent the corporation, for there is no general law or principle requiring vacancies on the board of directors to be filled before the remaining directors can act in the business of the corporation, provided, of course, the number left is sufficient to constitute a legal quorum. Under our General Statutes, page 279, section 12,

"a majority of the directors of any corporation, convened according to the by-laws, shall constitute a quorum for the transaction of business." In order, probably, to avoid a doubt that might arise whether a general assignment was such business as was contemplated under the above statute, the legislature, by the act of 1885 (Sess. Laws 1885, p. 493), provided that "the assignment of any corporation may be made by the directors in legal meeting called for such purpose." This, however, was not intended to change the rule as to a quorum under the preceding statute. There can be no doubt that a majority of the directors could make a valid assignment.

2. But this brings us to the second objection, that Henry R. Coit, one of the three who participated in making the assignment, was not a lawful director, and therefore the attempted assignment was made by only two directors. It is conceded that Coit was regularly appointed to the office, and that he was at the time a director *de facto*, but the contention is, that he was not eligible to the office because he was not a stockholder of the Brown and Brothers corporation. In behalf of the plaintiff, it is earnestly contended that the acts of Coit as a *de facto* director are perfectly valid, and cannot be questioned except once for all in a direct proceeding to oust him from the office, as upon a *quo warranto*. On the other hand, the counsel for the defendants contend that the principle applies only where there exists the element of an estoppel *in pais*, that is, where third parties have dealt with the corporation on the faith that its directors and agents had in fact the authority they were permitted to assume and exercise; but that the corporation itself could not invoke the aid of the same principle in support of the validity of its own acts which have affected the rights of third parties, because the corporation could not have been misled. We have no occasion to settle this interesting question, because we think Coit was a director *de jure*.

While we concede that he was not a personal stockholder of Brown and Brothers, yet by representation he was a stockholder; that is, he was secretary, treasurer, and managing director of the Litchfield Savings Society, which was, at the time of his appointment, a lawful stockholder in the corporation of Brown and Brothers. At any rate, he was eligible to the office of director under the act of 1876 (Sess. Laws 1876, c. 65), which provides that "any one of the directors or ex-

ecutive officers of any corporation, incorporated by the laws of this state, owning stock in any of the banks or other corporations of this state, shall be eligible to be elected as a director of such banks or other corporations, legally convened for the election of directors, and upon such election may act as director of such bank or other corporation."

But the claim is made that this provision was repealed by the seventh section of the new joint-stock act of 1880 (Sess. Laws 1880, p. 561), which, in providing that the affairs of every joint-stock corporation shall be managed by three or more directors, adds, "who shall be stockholders in the corporation."

There is no express repeal of the first-mentioned act, and the implication is strongly against it, from the fact that certain specific provisions of former statutes are mentioned as repealed, while the act of 1876 is not mentioned. Then, in connection with the general repealing clause of acts inconsistent, there is a saving, among other things, of any rights acquired under existing laws. The right of a savings bank, whose assets are invested in another corporation, to have a voice in directing its affairs is surely of great importance and value. The record does not tell us whether this investment of the Litchfield Savings Society existed when the act of 1880 was passed. We refer to this now to show the spirit and purpose of the legislature in carefully guarding all important rights and interests. There is no reason why in 1880 they should have desired or designed to repeal the wise and just provision of 1876. Nevertheless, the counsel for the defendants insist that, however wise and just, it must be swept away by the act of 1880, because it is so inconsistent with it that both cannot stand and operate together. We answer that both did stand and operate together for the period of four years at least, from 1876 to 1880, for it is to be borne in mind that the provision referred to in the act of 1880 was not new, but merely continued in force an old provision found in the General Statutes of 1875, page 312, section 1, and in the statutes long before that. When the joint-stock act was re-enacted in 1880 with some new provisions, it seems unreasonable to suppose that by the mere retention of the old provision in the same language, it could have been intended to give it a force and effect so much greater than it had for the four years preceding. The remedial nature of the acts in question, and the reasons for their enactment, will justify us in construing one

as explaining and qualifying the other. While it is true that only stockholders are eligible, the necessary implication is that all stockholders are eligible; but inasmuch as the savings bank in its corporate capacity could not well act as a director in another corporation, its executive officer or chief manager is the stockholder within the meaning of the two acts under consideration. In reaching the result that the provision of 1876 has not been repealed, we are glad to be supported by the new revision of the statutes, which goes into effect in 1888. In that revision the act of 1876 is retained in section 1922, while the provision of 1880 is also found in section 1950.

3. The only remaining objection is, that the meeting of the directors for the making of the assignment was illegal for defects in the notice. The only by-law or rule adopted relative to the matter prescribed simply that "meetings of directors may be held as often, at such place, and in such manner as they may from time to time determine." No formality whatever is prescribed, and if all the directors happened to be together and agreed to hold a meeting immediately for a particular object within their jurisdiction, we do not see how their action could be impeached on that ground. As the want of actual notice to the two directors who were absent from the state, at places so remote that they could not be reached, has been excused in this case, all the directors capable of acting under the circumstances were present.

But it is said that the statute which empowers directors to make an assignment requires that "the meeting be called for such purpose," and in this connection the defendants rely on the finding, which says that "there was no evidence that the telegram contained any notification as to the purpose of the proposed meeting." It will be observed that this is not a finding that the purpose was not specified, but only that the contents of the telegram had not been proved by either party; but under the circumstances we are about to mention, the burden of showing that the object was not specified was on the defendants. The record of this meeting is annexed as part of the finding, and it says: "At a special meeting of the directors of Brown and Brothers, called for the purpose of making an assignment of its estate in insolvency for the benefit of all the creditors, pursuant to the statutes," etc.

Upon this record, until the contrary is found, it must be presumed that the purpose was specified in the call. This principle is sustained by the case of *Sargent* v. *Webster*, 13 Met.

504, 46 Am. Dec. 743, where the validity of an assignment by a corporation for the benefit of creditors was sought to be impeached for want of notice to all the directors. Shaw, C. J., disposed of the objection as follows: "Another objection of the same kind is, that it does not appear that notice of the meeting was given to all the directors. But the contrary does not appear; and it would be hazardous to decide that every vote passed by an aggregate body is void if it do not appear by the record that all were notified. We believe it is not usual in corporate records to state how the members were notified. The presumption, *omnia rite acta*, covers multitudes of defects in such cases, and throws the burden on those who would deny the regularity of a meeting for want of due notice, to establish it by proof."

Our own court, in *Lane* v. *Brainerd*, 30 Conn. 565, applied the same principle both to directors' and to stockholders' meetings. The mere record of the meeting in the former case was presumptive proof that all the directors had been duly notified, and in the latter case the mere record of the organization of a corporation was presumptive evidence of a fact which was an indispensable condition precedent to its lawful organization.

We advise judgment for the plaintiffs.

CORPORATION, WHO MAY BE DIRECTOR: *Wight* v. *Railroad Co.*, 19 Am. Rep. 412; powers of director: *Gallery* v. *Nat. Ex. Bank*, 32 Id. 149.

CORPORATION, MEETING OF DIRECTORS, when notice to attend is presumed: *Chouteau Ins. Co.* v. *Holmes*, 30 Am. Rep. 807. See *Stow* v. *Wyse*, 18 Am. Dec. 99, and note 103.

PROCEEDINGS OF BOARD OF DE FACTO DIRECTORS of private corporation are presumed regular until irregularity is shown: *State* v. *Kupferle*, 100 Am. Dec. 265.

CORPORATION, ACT OF MAJORITY OF DIRECTORS, when binding: *Regents* v. *Williams*, 31 Am. Dec. 79; *Despatch Line* v. *Bellamy Mfg. Co.*, 37 Id. 203; *Elliot* v. *Abbot*, 37 Id. 227; *Edgerly* v. *Emerson*, 55 Id. 207; *Sargent* v. *Webster*, 46 Id. 743; *Commonwealth* v. *Cullen*, 53 Id. 450; *Cahill* v. *Kalamazoo Mut. Ins. Co.*, 43 Id. 465.

WHEN, IF EVER, NOTICE TO DIRECTORS TO ATTEND SPECIAL MEETING MAY BE OMITTED. — Where the meeting is stated and general, notice of the time and place of holding it, or of the business to be transacted, is, in the absence of provision or regulation to the contrary, in no case required: *State* v. *Bonnell*, 35 Ohio St. 10; *People* v. *Bachelor*, 22 N. Y. 128; *Merritt* v. *Farris*, 22 Ill. 303; *Warner* v. *Mower*, 11 Vt. 385. But if the meeting be a special one, the general rule is, that notice is necessary, and must be personally served, if practicable, upon every member entitled to be present, so that each one may be afforded an opportunity to participate and vote. According to the decided weight of authority, such notice is essential to the power of the board to do any deliberative act which shall bind the corpora-

tion: *Pike Co.* v. *Rowland*, 94 Pa. St. 238; *Kersey Oil Co.* v. *Oilcreek etc. R. R. Co.*, 12 Phila. 374; *Doyle* v. *Misner*, 42 Mich. 332; *Harding* v. *Vandewater*, 40 Cal. 77; *Farwell* v. *Houghton Copper Works*, 8 Fed. R. p. 66 (Mich.); *State* v. *Ferguson*, 31 N. J. L. 107, 124; and see *D'Arcy* v. *Tamar etc. R'y Co.*, L. R. 2 Ex. 158. An opportunity to deliberate, and if possible to convince their fellows, is the right of the minority, of which they cannot be deprived by the arbitrary will of the majority: *Commonwealth* v. *Cullen*, 13 Pa. St. 133; 53 Am. Dec. 450.

Nevertheless, it has been held that a corporation is bound where a legal quorum of the directors meet and unite in any determination, whether the other directors are or are not notified, and although the meeting was a special one: *Edgerly* v. *Emerson*, 23 N. H. 555; 55 Am. Dec. 207; and to the same effect, see *Bank* v. *Flour Co.*, 41 Ohio St. 552. So, although it be conceded that all the directors must be notified of a special meeting of the board, yet if the meeting be held, and a legal quorum be present, it will be presumed, in the absence of evidence to the contrary, that such notice was given, and that all steps were taken necessary to constitute it a regular and valid meeting of the board: *Chouteau Ins. Co.* v. *Holmes*, 68 Mo. 601; 30 Am. Rep. 807; *McDaniels* v. *Flower Brook Mfg. Co.*, 22 Vt. 274; *Wells* v. *Rahway White Rubber Co.*, 19 N. J. Eq. 402; *Leavitt* v. *Oxford etc. Min. Co.*, 3 Utah, 265; *Chamberlain* v. *Painesville etc. R. R. Co.*, 15 Ohio St. 225; see *Stow* v. *Wyse*, 7 Conn. 214, 18 Am. Dec. 99, and extended note 102, as to the validity of corporate acts done or authorized at a meeting not properly called. If no tice of a directors' meeting is sent by mail, the person notified must have, in the absence of any regulation, a reasonable time after receiving it to reach the place of meeting by traveling in the customary manner: *Covert* v. *Rogers*, 38 Mich. 363. If the corporation fails to avail itself of the power to fix the time and manner of giving notice of special meetings, and leaves the entire matter to the discretion of one of its principal officers, it has no right to complain of the insufficiency of the notice given, so long as it appears that sufficient time was given to enable the parties to be present if they desired: Id. 367.

DIAMOND MATCH CO. *v.* TOWN OF NEW HAVEN

[55 CONNECTICUT, 510.]

TOWN — LIABILITY FOR INJURY RESULTING FROM OBSTRUCTION OF STREAM. — An act of the legislature authorized the defendant town to deepen, etc., all the streams and watercourses within the limits of the town, at such times and in such manner as the public health, in the opinion of the selectmen, might require. Under this authority the selectmen, in the exercise of reasonable care, straightened and deepened the channel of a river running through the town, the work having been planned and laid out by a competent engineer employed by them. Ample provision was made for all ordinary floods in the river, but an extraordinary freshet afterwards occurred, when the ground was frozen and not able to absorb the water, and the new channel being narrowed by the addition of earth to its banks, the water was set back upon and injured the property of the plaintiff. *Held*, that the town was not liable, although the injury resulted from the oversight or misjudgment of the engineer in permitting the excavated earth to be deposited on the banks of the new chan-

nel, which was no part of the original plan, but was done as required under a contract, the specifications of which were prepared by the engineer.

ACTION for obstructing the flow of a stream, whereby the plaintiffs' property was injured. The opinion states the facts.

C. R. Ingersoll, for the appellants.

J. S. Beach and F. G. Beach, for the appellees.

By Court, PARK, C. J. In the year 1881 the selectmen of the town of New Haven straightened and deepened the channel of West River, which flowed through the western part of the town and emptied into the harbor. The course of the river was winding, and its width varied from five hundred feet in some places to fifteen hundred in others. It ran through low meadow lands, covering them to a considerable extent, and became thus a source of malarial disease. Complaint was made of its injury to the public health, and the purpose of the selectmen in straightening and deepening the channel of the river was to confine it to narrow limits, and thus put a stop to its deleterious influence. It was the abatement of a nuisance. It was a sanitary measure, and a necessary one.

Two avenues crossed the river, which were public highways of the city and town. One, Whalley Avenue, was on the north, and the other, Derby Avenue, was on the south of the meadow through which the river flowed. The alterations of the channel extended from one avenue to the other.

The town employed the best engineering skill for the preparation of the plans for the work, and everything was done in accordance with the plans thus prepared. In the opinion of the engineers, as ample provision was made for the passage of the water below Whalley Avenue as existed before. The selectmen intended to secure this, and believed they had done so.

Before the change in the channel of the river, the water, in times of freshet, overflowed the banks and became ponded on the low meadow lands, and it was thought that the change in the channel would make no difference in this respect. But the earth thrown out in excavating the new channel was placed on the sides of the channel in such a manner as to prevent this overflow, and this, with the stopping up of the old channel, caused the water to set back in times of flood, and the

water thus set back did the damage complained of by the plaintiffs. With regard to the character of the flood and the circumstances attending it, the court finds as follows:—

"It occurred at the time of an exceptionally heavy rainfall in the winter season of 1885, which, with the smooth and hard surface of the ground co-operating, occasioned severe freshets, not only in West River, but throughout a wide extent of country. It was an extraordinary freshet as compared with the ordinary annual overflows or freshets common to the river. . . . . The freshet was unusual and extraordinary, but not unprecedented; and had the rise in the river been only the ordinary annual freshet, the damage to the plaintiffs would not have resulted. . . . . In addition to the annual freshets, the river was subject in occasional years to extraordinary freshets or floods, which should be expected occasionally to occur. . . . . The waterway span of Whalley Avenue bridge is one hundred feet, and is ample to take and discharge all water coming in such extraordinary freshets or floods occasionally occurring, and the waters of such freshets could easily and readily be disposed of by permitting the same to spread over the low meadow lands without the obstruction of the banks of the new channel."

These are the principal facts of the case. It is expressly found that the work was done under authority conferred upon the town by a private act passed by the legislature in 1881, and which may be found among the acts of that year, page 230. That act authorized "the town of New Haven, acting by and through the selectmen thereof," to "deepen, clear out, alter, and straighten any and all streams and watercourses, natural and artificial, or any portion thereof," within the limits of the town, "in order to protect and preserve the public health," and they were authorized to do it "at such times and in such manner as the public health, in the opinion of the selectmen, may require."

Acting under this authority, the selectmen of the town, believing that the preservation of the public health required that certain alterations in the channel of West River should be made, employed the city engineer to make an examination and determine what could be done to accomplish the object. The work involved a problem of scientific engineering. It required, for the abatement of the nuisance, that the channel of a winding and sluggish river should be straightened, to

keep its waters from spreading over a wide expanse of territory. The question was, how this could be done in the most efficient manner with reference to confining the water within the new channel, and at the same time provide an ample way for all the water passing under the Whalley Avenue bridge, which opening, the case finds, was ample for the passage of all water coming down the river at all times, extraordinary as well as ordinary.

The matter had thus to be considered prospectively. The selectmen were to judge as well as they were able of future results. The best human judgment is liable to err in such a case. After an injury has occurred, and all the facts with regard to it have been investigated, it is often quite easy to see how it might have been avoided, but with a slight change in the circumstances a new case would be presented, in dealing with which human judgment would be liable to be again in error. All that can be expected or required is, that officials, in the performance of a duty, shall bring to the service reasonable care and judgment, and that professional men employed by them in planning and superintending the work shall have all the knowledge and skill that experience in such work would naturally give them. It would seem in this case that such care was exercised by the selectmen, and that such skill and experience were brought by the city engineer to his part of the work. No complaint is made of any want of skill in the engineer, or of intelligent and careful consideration of the matter on the part of the selectmen. Every effort seems to have been made by both to have the work so done, as, while effecting the great object for which it was undertaken, to do as little harm as possible to private property. And it does not appear that the work was not so done as to secure the safety of contiguous property in all ordinary freshets; that is, in such as might reasonably be expected, and therefore ought to be provided for. The case finds that ample provision was made for all ordinary floods in the river, and that it was only an extraordinary rainfall in the winter season, when the ground was frozen and not able to absorb the water, that could produce such a flood as the one that caused the damage complained of to the property of the plaintiffs.

In the case of *State* v. *Ousatonic Water Co.*, 51 Conn. 137, this court, in remarking upon a case of this sort, said: "The defendants were bound to provide against all the natural re-

sults of ordinary freshets in the river, whenever they might occur, and with whatever ordinary combination of circumstances they might be attended. The defendants were not bound to make provision against extraordinary freshets in the river, which rarely happen, or against extraordinary effects of ordinary freshets, owing to some peculiar and uncommon combination of circumstances. They were bound to consider and prepare for the ordinary results of ordinary freshets, and not extraordinary freshets nor extraordinary results." This was said with reference to the building of a dam by the defendants over the Housatonic River, but the same can be said with equal propriety in the case at bar.

In *Smith* v. *Agawam Canal Co.*, 2 Allen, 355, the court, in remarking upon extraordinary freshets, says: "The changes which result from such causes are uncertain in extent and in the times of their occurrence; and the losses of which they are the occasion must be borne by those upon whom they fall." And in *Sprague* v. *City of Worcester*, 13 Gray, 193, the court remarks as follows upon the same subject: "By the exception of extraordinary freshets for unimportant periods of time, we consider was meant freshets not ordinarily occurring annually, but which come occasionally."

But it is said that the flood which did the damage in this case, though unusual, was not unprecedented, and that such extraordinary floods had sometimes, though infrequently, occurred, and ought therefore to have been expected and provided for. But the flood in the case of the Housatonic River referred to was not an unprecedeted one, and yet the defendants were held not to be liable in that case, their liability or non-liability depending upon the character of the flood, as in this case. An extraordinary freshet, in the view there taken of the matter, is not necessarily an unprecedented one, but it may be one that happens so rarely, or in such unusual circumstances, that it is not to be expected. And it was so regarded in the cases cited from Massachusetts. And it is to be specially noticed in this case, that, aside from the extraordinary character of the flood, the frozen condition of the ground added greatly to its effectiveness for mischief. The water was not in part disposed of, as would happen in most floods, by soaking into the ground, but was compelled to flow in full tide within the frozen banks. This incident of the flood, in combination with the extraordinary rainfall, could

not have been regarded as falling within ordinary probabilities, and therefore was not reasonably to be expected.

But it is said that the raising of the banks of the new channel was no part of the engineer's plan, but was done by the contractor, under the authority of the selectmen, as the cheapest and most convenient mode of disposing of the earth thrown out in digging the new channel; and that it is found that the damage complained of would not have been done but for this raising of the banks, which held all the water within the new channel instead of its overflowing and escaping upon the low lands adjoining the river. But it is expressly found that the first contract for the excavation of the new channel contained among its specifications a provision for this precise thing, that is, that "the material excavated from the new channel should be deposited on each side of the cut"; and it is further found that the specifications were prepared by the city engineer. It also appears that the engineer was to supervise the work, and that any imperfect work was to be immediately corrected upon his requirement, and that the work was in fact done to his acceptance. Upon these facts it is impossible to regard the raising of the banks as done by the selectmen upon their own judgment, and in disregard of the plans and advice of the engineer. If there was misjudgment in the matter, we must regard it as that of the engineer, and not of the selectmen. As the placing upon the banks of the earth thrown out was the natural and ordinarily the proper mode of disposing of it, it was a failure of duty on the part of the engineer, if it was no part of his plan and he saw the danger arising from it, not to indicate upon his plan, or in some mode have made it clear to the selectmen, that it ought not to be done. Especially was he in fault if, seeing the danger from it, he yet drew the specification which required it. But as the selectmen had employed a competent engineer, the town cannot be liable for his oversights or misjudgments.

We have not thought it necessary to consider the question so ably argued before us, whether the duty discharged by the town was a governmental one, giving it some exemption from liability that would not exist if the duty was not of such a character, because, upon the theory which would hold the town to the highest liability, we think there was no negligence on the part of the selectmen by which the town could be made liable.

We think the defendant town was not liable, upon the facts found, for the damage done to the plaintiffs in this case.

There is error in the judgment appealed from, and it is reversed.

MUNICIPAL CORPORATION, LIABILITY FOR DIVERTING SURFACE WATER upon premises of another: *Pye* v. *Mankato*, 1 Am. St. Rep. 671, and cases collected in note 673; *Gillaly* v. *City of Madison*, 53 Am. Rep. 299; liability for negligence in increasing flow from insufficient sewers: *Seifert* v. *City of Brooklyn*, 54 Id. 664, and note 671; *Ashley* v. *Port Huron*, 24 Id. 552, and note 556; can acquire no right to turn a stream of water upon the lands of another, to the injury thereof, only by an exercise of the power of eminent domain: *Pettigrew* v. *Evansville*, 3 Id. 50.

CASES

IN THE

COURT OF APPEALS

OF

VIRGINIA.

MUSE *v.* STERN.

[82 VIRGINIA, 88.]

RULE OF APPELLATE COURT WHERE THERE HAVE BEEN TWO TRIALS of a case in the lower court is, to look only to the proceedings on the first trial, and if it discovers that the trial court erred in setting aside the verdict on that trial, to set aside all proceedings subsequent to such verdict, and enter judgment thereon.

WHERE EVIDENCE IS CONFLICTING, AND INVOLVES CREDIBILITY OF WITNESSES, and the trial court sets aside the verdict and certifies the evidence, the appellate court will look to the whole evidence and sustain the verdict, unless there has been a plain deviation from right and justice, and the verdict is against the law or the evidence, or without evidence.

POWER OF COURT TO GRANT NEW TRIAL BECAUSE VERDICT IS CONTRARY TO EVIDENCE should be cautiously exercised, and never, in a doubtful case, merely because the court, if on the jury, would have given a different verdict.

LIABILITY OF THIRD PERSON TO PERSON INJURED, FOR NEGLIGENCE OF ANOTHER, PROCEEDS upon the maxim, *Qui facit per alium, facit per se*, and presupposes the existence of the relation of master and servant between such third person and the person actually guilty of the negligent act.

MASTER AND SERVANT, WHEN RELATION DOES NOT EXIST. — One Straus, who was the partner in business of the defendant, Stern, individually owned a horse and phaeton. He sent them, in charge of his own servant, to meet the defendant and convey him from the depot to the store of the firm. While going in the direction of the store with the defendant, the servant recklessly drove against the plaintiff, Muso, and knocked him down and injured him. In an action for damages for the injury sustained, *held*, — 1. That the relation of master and servant did not exist between the defendant and the driver at the time of the injury, and the plaintiff could not recover; 2. That the negligence which caused the injury could not be considered as that of the defendant, merely because he was present at the time.

ACTION of trespass on the case. The facts appear in the opinion.

Robert Stiles, for the plaintiff in error.

John Lyon and A. M. Keiley, for the defendant in error.

By Court, HINTON, J. The action was trespass on the case, to recover damages for the negligent management and direction of a horse and phaeton, whereby the plaintiff was injured. At the time of the accident the defendant was being driven by the coachman, pursuant to an order from his employer, who was a partner of the defendant, to the firm's place of business, on Main Street, in the city of Richmond.

There were two trials of the case in the court below. On the first trial the jury found a verdict for the plaintiff, which was set aside by the court; whereupon the plaintiff excepted. Upon the second trial the verdict was for the defendant; and the court refusing to set it aside, the plaintiff again excepted. With this last bill of exceptions the facts proved are certified.

In the progress of these trials exceptions were taken to other rulings of the court, but as in the view I take of the case it must be decided on grounds wholly distinct from those contained in those exceptions, it will not be necessary for me to advert to them in this opinion.

The rule of the appellate court, where there have been two trials of a case in the lower court, is to look only to the proceedings on the first trial, and if it discovers that the trial court erred in setting aside the verdict on that trial, to set aside and annul all the proceedings subsequent to said verdict, and enter judgment thereon: *Pleasants* v. *Clements*, 2 Leigh, 474; *Terry* v. *Ragsdale*, 33 Gratt. 344; *Brown* v. *Rice's Adm'r*, 76 Va. 665.

Looking, then, to the proceedings on the first trial, a preliminary inquiry arises as to the attitude in which the plaintiff in error should stand in this court. In this case, unlike most cases in which the complaint is of a judgment refusing or granting a new trial, the court has "declined to certify the facts because the evidence is conflicting and contradictory, and involved questions of the credibility of the witnesses," and has certified the evidence. The question, therefore, is, whether the appellate court will look to the whole evidence in determining whether the circuit court erred in its action in setting aside the verdict, or will only entertain the plaintiff

upon condition that he shall surrender all of his oral evidence, and rest his case upon the evidence of the defendant.

For the plaintiff in error, it is strenuously insisted that where the plaintiff comes to this court with the verdict of the jury, who are the proper triers of the facts, and whose judgment is entitled to especial weight in all cases where there is a conflict of evidence and questions as to the credibility of witnesses, in his favor, the court should look to the whole evidence upon the first trial, and sustain the verdict rendered upon that trial, unless it can perceive that there has been a plain deviation from right and justice, and that the jury have found a verdict against the law or against the evidence, or without evidence. And upon a careful consideration of the subject we have arrived at the same conclusion.

From a brief review of the leading cases in regard to new trials in this state, it will be readily seen that there is nothing in the reasons upon which they are rested which militates in the slightest degree against the adoption of such a rule.

In *Bennett* v. *Hardaway*, 6 Munf. 125, it was held that in cases depending upon the oral testimony of witnesses the bill of exceptions must contain the facts which the court considered established by the testimony, and not the testimony itself. The reason given for this resolution is, that it would be unsafe for this court to revise and reverse an opinion of the lower court, on a question perhaps touching the weight of evidence and the credit of witnesses, without having the same lights and the same *data* as were possessed by the inferior court. And Judge Roane, who delivered the opinion of the court, as an illustration of one of the evil consequences which might result from the adoption of the opposite rule, said: "It does not follow that the judge believes every witness who gives evidence before him, as he may well hesitate to do from the manner of testifying and other extraneous circumstances; nor can he do it where they conflict one with another. It is evident, therefore, that in this case the opinion of this court might be founded on the testimony of witnesses who were discredited both by the jury and the court below." On the other hand, says he, where the bill contains a certificate of facts, the exception is not liable to the objections which exist when the evidence is certified. For in that case, "the appellate court does not . . . . depart from or overrule the decision of the trying court as to the weight of testimony, or the credit

due to any witness. It only acts upon his own certificate, and acknowledgment of his opinion upon the subject. Such a bill of exceptions . . . . only states briefly the facts as they appeared to the judge, and are admitted by him to have been proved, and in consequence of such, his admission, the appellate court founds its decision upon the same facts as governed the court below."

But this case (*Bennett* v. *Hardaway*, *supra*) was soon—to adopt the expressive phrase of Carr, J., in *Ewing* v. *Ewing*, 2 Leigh, 340—curtailed of its fair proportions. For, by a line of decisions, beginning with *Carrington* v. *Bennett*, 1 Id. 340, decided as early as 1829, it was quickly established, as a qualification of the rule, that if the bill of exceptions contains a certificate of the oral testimony given on the trial, the appellate court would review and reverse the judgment, if, after rejecting all the oral testimony of the excepting party, and giving full force and credit to the evidence of the adverse party, the judgment still appears to be wrong: *Rohr* v. *Davis*, 9 Leigh, 30; *Pasley* v. *English*, 5 Gratt. 141; *Carrington* v. *Goddin*, 13 Id. 587; *Gimmi* v. *Cullen*, 20 Id. 439; *Read's Case*, 22 Id. 924; *Danville Bank* v. *Waddill*, 31 Id. 469; *Dean's Case*, 32 Id. 916; *Creekmur* v. *Creekmur*, 75 Va. 432; *Taylor's Case*, 77 Id. 692. This qualification, while it restricts the operation of the rule laid down in *Bennett* v. *Hardaway*, *supra*, does not contravene the principle of that case. For, as Cabell, J., acutely observes, in *Ewing* v. *Ewing*, *supra*, the appellate court does not decide on the credit of the witnesses; it proceeds on the admission of their credit; "and surely if," as a former and distinguished judge of this court puts it in a lucid article touching this subject, "a judgment against a party, after he has been stripped of all his own oral evidence, and all his adversary's evidence has been accorded full force and credit, still appears to be wrong, that judgment ought to be reversed": Va. L. J., 1885, p. 259.

This court having gone thus far in opening the door for the admission of evidence, in *Powell* v. *Tarry*, 77 Va. 263, took another step forward, and in that case held that whenever the inferior court, for any cause, could not or would not certify the facts, that it must, upon the application of the party aggrieved, certify the evidence; thus expressly overruling *Grayson's Case*, 6 Gratt. 724, upon this particular point, and by necessary implication overruling *Brooks* v. *Calloway*, 12 Leigh, 466, and *Taliaferro* v. *Franklin*, 1 Gratt. 332, on the same point.

It will be seen from this *résumé* of the cases that there has been a very gradual but growing disposition on the part of the court to relax the rule established in *Bennett* v. *Hardaway*, *supra*, prohibiting the court from a judgment granting or refusing a new trial when the certificate contained the evidence instead of the facts, wherever it could be done without invading the province of the jury, and referring questions as to the weight of evidence and credit of witnesses to this court, and revising the judgment of the trying court upon lights and *data* inferior to those possessed by that court.

The rule contended for will produce neither of these results. It refers no question as to the credit of the witnesses to this court; but assuming that the witnesses who testified for the party prevailing are equally credible with those who testified for the loosing side, leaves it to this court upon the evidence as a whole whether there has been a plain deviation from right and justice, and whether the verdict was against law or contrary to the evidence,—i. e., without evidence or against evidence. Nor will such a rule be amenable to the objection that it enables the appellate court to revise the judgment of the lower court without having the same lights and *data* that were possessed by that court. For we must presume, from the failure of the judge to certify otherwise, that he believed all of the witnesses to be credible, and therefore that he set aside the verdict on the only grounds upon which he could properly set it aside,—that is, because it was without evidence, against the evidence, or against law. Excluding, then, the supposition that he saw something in the manner of testifying of some of the witnesses that impaired their credit, for the reason stated above, that he declined to certify that such was the case, as he clearly might have done, it seems to us to be obvious that the appellate court has all the means necessary to lead them to a correct conclusion that were possessed by the lower court. It is equally clear that cases of the kind with which we are now dealing do not fall within the reason of the rule which requires the exceptor, where both the jury and the court below are against him, to strip himself of all his oral testimony, and prevail—if prevail he can—upon the evidence of his adversary, and therefore ought not to be bound by that rule. After careful reflection, we perceive no valid objection to our looking to the whole evidence in cases like the present one; and as it seems that that was done in *Brown* v. *Rice*, 76 Va. 630, it will be done here.

It seems, however, to be assumed that if we look to the evidence in this case we must affirm the verdict. To this we do not assent. For whilst great weight is always — and justly — attributed to the verdict of a jury in a case where the evidence is conflicting and the credibility of witnesses is involved; and whilst the power of the court to grant a new trial because the verdict is contrary to the evidence should be very cautiously exercised, and never in a doubtful case merely because the court, if on the jury, would have given a different verdict, — yet we believe it cannot be successfully controverted that the power exists: *Ross* v. *Overton*, 3 Call, 319; 2 Am. Dec. 552; *Brugh* v. *Shanks*, 5 Leigh, 649; *Green* v. *Ashby*, 6 Id. 150; *Patteson* v. *Ford*, 2 Gratt. 23; *Hill's Case*, 2 Id. 595; *Downer & Co.* v. *Morrison*, 2 Id. 240. And that in a proper case — that is, where the verdict is clearly contrary to the law and evidence — it should be exercised.

In this case we think the verdict was clearly contrary to the law and the evidence. For whatever conflict of testimony there may be about points of evidence not vital to the merits of the case, the evidence incontestibly establishes the following facts: The coachman in charge of the horse and phaeton on the occasion of the accident was a domestic servant, hired and paid by one M. L. Straus, the father-in-law and partner of the defendant Stern. The horse and phaeton were the individual property of Straus, and kept on his premises. The business of the boy or coachman was to attend to the horse and phaeton, and when not so engaged to attend about the house, and in good weather drive Mr. Straus out. That on the occasion of the accident, the driver had been sent by Straus to meet the defendant and convey him from the depot to the store of the firm. And that as soon as the defendant got into the phaeton the driver drove off rapidly down Byrd Street in the direction of the store; and in driving across the railroad track on Eighth Street, the plaintiff was struck by one of the wheels of the vehicle, and knocked down and injured.

Now, upon this state of facts, can it be maintained that the driver was the servant of the defendant?

The liability of a third person to the person injured, for the negligence of another, proceeds upon the maxim, *Qui facit per alium, facit per se*, and presupposes the existence of the relation of master and servant between such third person and the person actually guilty of the negligent act. It is founded

upon the right which the employer has to select his servants, and to discharge them if not competent or skillful, and to direct and control them while in his employ. The servant is regarded as an instrument set in motion by the master, and if any injury occurs to another through the negligence or unskillfulness of such servant while in the course of his employment, it is deemed reasonable that he who has selected the servant should be answerable for such injury: *Turberville* v. *Stampe*, 1 Ld. Raym. 266; *Smith* v. *Lawrence*, 2 Man. & R. 1; *Rapsen* v. *Cubitt*, 9 Mees. & W. 710; *Hobbit* v. *London and Northwestern R'y Co.*, 4 Ex. 254; *Crockett* v. *Calvert*, 8 Ind. 127. Hence, in cases of this character, when it has once been ascertained in whose employ the servant actually is, it is only necessary to ascertain further that the servant was engaged, at the time the act of negligence was committed, in the performance of some duty enjoined upon him by his master, within the scope of employment, to fasten upon the master a liability for any injury resulting from the negligent act of the servant.

These views have received the approval of the most distinguished judges and text-writers in this country and in England: Story on Agency, 9th ed., secs. 453 et seq.; Wharton on Negligence, 2d ed., secs. 156 et seq.; 1 Parsons on Contracts, 105 et seq.

In the great case of *Laugher* v. *Pointer*, 5 Barn. & C. 547, it was held by Lord Tenterden, C. J., and Littledale, Bayley, and Holroyd, JJ., dissenting, that the owner of a carriage, who had hired of a stable-keeper a pair of horses to draw the carriage and a driver to drive them, there being no evidence of any adoption on the part of the owner of the carriage of the driver as his servant, was not liable for an injury done to the horse of a third person through the negligent driving of such coachmen or driver. In that case, Littledale, J., said: "According to the rules of law, every man is answerable for injuries occasioned by his own personal negligence; and he is answerable also for acts done by those whom the law denominates his servants; because such servants represent the master himself, and their acts stand upon the same footing as his own. And in the present case the question is, whether the coachman, by whose negligence the injury was received, is to be considered a servant of the defendant. For the acts of a man's own domestic servants there is no doubt the law makes him responsible; and if the accident had been occasioned by

a coachman who constituted a part of the defendant's own family, there would be no doubt of the defendant's liability; and the reason is, that he is hired by the master either personally or by those who are intrusted by the master with the hiring of servants, and he is therefore selected by the master to do the business required of him."

In *Quarman* v. *Burnett*, 6 Mees. & W. 409, the same question arose in the court of exchequer, and the opinions of Lord Tenterden and Littledale, J., were affirmed in a carefully prepared opinion by Baron Parke. In the course of that opinion, he says: "Upon the principle that, *Qui facit per alium, facit per se*, the master is responsible for the acts of his servants, and that person is undoubtedly liable who stood in the relation of master to the wrong-doer,—he who had selected him as his servant, from the knowledge or belief in his skill and care,—and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference."

In view of these well-settled principles, we cannot escape the conclusion that the relation of master and servant did not exist, either in law or in fact, between the defendant and the driver at the time the injury was received by the plaintiff.

It may be true, as observed by Baron Parke in *Quarman* v. *Burnett*, *supra*, that there may be special circumstances which may render the hirer of job-horses and servants, and I apprehend other bailees as well, responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at one particular moment, and the like. But as none of these or like circumstances appear in the evidence in this case, we need give no opinion as to the legal effect of them.

It is sought, however, to liken this case to the case of *McLaughlin* v. *Pryor*, 4 Man. & G. 48. That case went off on the ground that the defendant was a joint trespasser with the post-boys. But none of the circumstances relied on in that case to render the defendant liable exist in this. There the defendant, who, together with a party of friends, had hired a carriage and four post-horses, driven by two postilions in the

service of the owner of the horses, was on his way to Epsom races. The defendant and another person rode on the box of this carriage. The plaintiff was also proceeding to the races in a pony-gig belonging to and driven by one Mason. At the toll-bar at Sutton a line of carriages had formed, and Mason's gig was in that line. The carriage in which the defendant and his friends were driving came up to the toll-bar about the same time with Mason's gig, but the carriage was out of line. Mason's gig was advancing at the time, slowly, in the line (there being a stoppage for the purpose of taking toll at the gate), when the postilion on the wheel-horse of the carriage in which the defendant was seated called out to the postilion on the leader, "Go in there!" The latter immediately turned his horses' heads before Mason's gig. Mason endeavored to keep his pony in the line, when the man on the wheel-horse of the carriage again called out, "Go on, you are all right, there!" The postilion on the leader again pushed his horses forward, and the trace of the wheel-horse caught the wheel of Mason's gig, and pulled it over, and both the plaintiff and Mason fell out. Some one in the carriage called out, "Go on, go on!" but Mason got up, and laying hold of the horses' heads, stopped them, telling the party in the carriage that they should not move on, for he was determined to take the horses back to the cock at Sutton until he knew to whom they belonged. After some discussion, the defendant said to Mason: "I will settle it with you here now; I will give you money to any amount; tell me what you want; you shall have it." Mason refused to settle the matter then, but after the defendant had given him his card, saying he would be answerable for all that had occurred, the carriage was allowed to proceed. The defendant subsequently twice admitted that he was in duty bound to repair the gig, but said he would settle with the plaintiff, McLaughlin, first. But a dispute having arisen between the parties as to the accident, the defendant said: "If you had quietly gone out of the line, it would not have happened. If you had done that, I had intended to have pulled up and let you in again, in the front." In that case, Tindal, C. J., after saying that the post-boys were trespassers, said: "Then the question is, whether the defendant was jointly a trespasser with them; whether the part he took in the proceeding was sufficient to make him liable with them; and whether there were circumstances in the case which would justify the jury in coming to that conclusion." Proceeding to

argue as to the liability of the defendant, Pryor, the chief justice then says: "It appears that he was riding on the box of the carriage when the accident occurred, and saw what was going on; that there was a line of carriages, into which the post-boys were endeavoring to force themselves; and he must have known the object of the post-boys in doing what they did." Then, after saying that the fact that he saw what was done was some evidence, "though . . . . not strong evidence," to go to the jury to show that he assented to the act of the post-boys, the chief justice adds: "There is nothing to show that he repudiated the act of the post-boys; on the contrary, he professed throughout to hold himself responsible; he told Mason, who was driving the gig in which the plaintiff was seated at the time of the accident, that if he had succeeded in getting into the line, he should have allowed Mason to return to his former position in the line. All this shows that he had a control over the post-boys, and that he assented to their acts." In that case, it was held that the defendant was liable, not as a master for the acts of his servant, but as a joint trespasser, on the ground that it appeared that he assented to the act from which the injury occurred to the plaintiff.

It can scarcely be necessary for me to comment further on this case to show that there is no analogy between that case and the case at bar, or to show that observations applicable to that case, which was a case of trespass, would hardly be pertinent to this, which is a case of negligence. It can, however, furnish no precedent for the case in hand.

But again, I am unable to assent to the suggestion that the negligence which caused the injury to the plaintiff is to be considered as the negligence of the defendant himself merely because he happened to be present at the moment of the accident; for the very same reason would require us to hold every passenger in a hackney-coach liable for injuries received by third persons through the negligence of the driver, and this latter position is so manifestly untenable that it has never been assumed. For the reasons given, we think the first verdict was clearly contrary to the law and the evidence, and consequently that the court did not err in setting it aside and granting a new trial; and for the same reasons, that there is no error in the judgment of the circuit court on the second trial, and the same is therefore affirmed.

LACY, J., and FAUNTLEROY, J., dissented.

Judgment affirmed.

VERDICT, SETTING ASIDE, AS AGAINST WEIGHT OF EVIDENCE: *Ophir Silver Mining Co.* v. *Carpenter*, 97 Am. Dec. 550, and note 560; *Beall* v. *Leverett*, 79 Id. 298; when not set aside for conflict in testimony: *Smith* v. *Wilson*, 1 Am. St. Rep. 669; *St. Louis etc. R. R. Co.* v. *Terhune*, 99 Am. Dec. 504.

MASTER AND SERVANT, what care relation of requires each to exercise: *Wormell* v. *Maine Central R. R. Co.*, 1 Am. St. Rep. 321, and cases collected in note 330; *Smith* v. *Peninsular Car Works*, 1 Id. 542, and note 548.

LIMITATION OF MASTER'S LIABILITY for acts of servant: See *Baker* v. *Kinsey*, 99 Am. Dec. 438; *Hilsdorf* v. *St. Louis*, 100 Id. 352, and note 357; *Fick* v. *Railroad Co.*, 60 Am. Rep. 878, and extended note 880.

BAILEY *v.* COMMONWEALTH.

[82 VIRGINIA, 107.]

RAPE CONSISTS IN HAVING UNLAWFUL CARNAL KNOWLEDGE by a man of a woman, forcibly and against her will, and the offense may be committed as well on a woman unchaste, or a common prostitute, as on any other female. Wherever there is a carnal connection, without consent in fact, fraudulently or otherwise obtained, there is in the wrongful act itself all the force which the law demands as an element of the crime.

CONSENT INDUCED BY FEAR OF BODILY HARM IS NO CONSENT, and though a man lay no hands on a woman, yet if by an array of physical force he so overpowers her mind that she dare not resist, he is guilty of rape by having the unlawful intercourse.

RAPE, CIRCUMSTANCES UNDER WHICH SEXUAL INTERCOURSE AMOUNTS TO. —The accused entered the bed of the prosecutrix, his fourteen-year-old step-daughter, which was situated in a room in which three younger children were sleeping. There were no other persons in the house, the mother and older sister of the prosecutrix being absent, beyond call and reach. The prosecutrix forbid the accused from getting into bed with her, but made no outcry, and he got in, "held her hands, brought his private parts in contact with her private parts, and forced her." The children in the room were not awakened, a neighbor living one hundred yards distant heard nothing of it, and the prosecutrix made no complaint until nearly a week afterwards. The accused admitted that he had had intercourse with the prosecutrix. The jury found him guilty of rape. *Held*, that under the circumstances of the case, the verdict of the jury should not be disturbed.

PENETRATION IS ESSENTIAL ELEMENT OF CRIME OF RAPE; but proof of the carnal knowledge of a female against her will by force is proof of rape.

RAPE. The prisoner was found guilty, and his motion for a new trial being overruled, he excepted, and obtained a writ of error. The facts appear in the opinion.

F. S. Blair, for the plaintiff in error.

R. A. Ayers, attorney-general, for the commonwealth.

By Court, LACY, J. The charge is, that in the night-time the plaintiff in error entered the bed of his fourteen-year-old

step-daughter, which was situated in a room in which three other small children were sleeping, the largest eight or ten years old; that there were no other persons in the house, the wife of the prisoner and the mother of the prosecutrix being absent at a party in the neighborhood, to which, with an older daughter, she had been escorted by her husband, the prisoner; that the prosecutrix forbid the prisoner from getting into bed with her, but made no further resistance; "that the prisoner held her hands, and brought his private parts in contact with her private parts, and forced her"; that the children in the room were not awakened, a person living one hundred yards off heard nothing of it, and another neighbor one fourth of a mile away heard no noise. The mother and older sister returned from the party in the neighborhood that night, and heard nothing of it until, six days afterwards, the prosecutrix told her mother. The magistrate, who issued the warrant, says that the prisoner confessed to him that he had had intercourse with his step-daughter, that she was no kin to him, and he wanted to be first.

The atrocious character of the charge made, and the revolting circumstances attending it, cannot but excite the indignation and receive the condemnation of every person. The charge, however, is rape, and it is necessary to consider, under the law and in the light of the decisions, whether that charge is made out by the evidence and sustained by the proofs.

Rape is the having of unlawful carnal knowledge by a man of a woman, forcibly and against her will. Our statute provides that if any person carnally know a female of the age of twelve years or more, against her will, by force, he shall be, at the discretion of the jury, punished by death, or confined in the penitentiary not less than ten nor more than twenty years. This offense may be committed as well on a woman unchaste, or a common prostitute, as on any other female. In matter of evidence, however, want of chastity may, within recognized limits, be shown as rendering it more probable that she consented.

Wherever there is a carnal connection, and no consent in fact, fraudulently obtained, or otherwise, there is evidently, in the wrongful act itself, all the force which the law demands as an element of the crime. In the ordinary case, when the woman is awake, of mature years, of sound mind, and not in fear, a failure to oppose the carnal act is consent. And it has

been held that, though she objects verbally, if she makes no outcry and no resistance, she by her conduct consents, and the carnal act is not rape in the man; and that the jury must be satisfied that she resisted the man to the extent of her ability; that the resistance must be up to the point of being overpowered by actual force, or of inability, from loss of strength, longer to resist; or that resistance is dangerous, or absolutely useless; or there must be dread or fear of death; that the will of the woman must oppose the act, and that any inclination favoring it is fatal to the prosecution.

While, on the other hand, it has been held that, in this age, to compel a frail woman or girl of fourteen to abandon her reason, and measure all her strength with a robust man, knowing the effect will be to make her present deplorable condition the more wretched, yet not to preserve her virtue, on pain of being otherwise deemed a prostitute, instead of the victim of an outrage, is asking too much of virtue and giving too much to vice. The law requires that the unlawful carnal knowledge shall be against her will. She must resist, and her resistance must not be a mere pretense, but must be in good faith. She must not consent. If she consent before the act, it will not be rape. But as to this consent, we may observe that it must be a consent, not controlled and dominated by fear.

If the girl is very young, and of a mind not enlightend on the question, this consideration will lead the court to demand less clear opposition than in the case of an older and more intelligent female, or even lead to a conviction where there was no apparent opposition. A consent induced by fear of bodily harm or personal violence is no consent; and though a man lay no hands on a woman, yet if by an array of physical force he so overpowers her mind that she dares not resist, he is guilty of rape by having the unlawful intercourse.

In a case when in the dead hour of darkness and of night, in a house where there is no help, save from three sleeping children, the oldest eight or ten years old, with the knowledge that her mother and older sister are beyond call and beyond reach, a girl fourteen years of age sees her step-father preparing himself to come to bed to her, asserting his unlawful desires toward her, and she finds courage to forbid him to enter her bed, she has perhaps expressed her refusal to consent to the unlawful cohabitation to as great an extent as the law will require, before holding the unnatural ravisher to the law's penalties.

It must be remembered that from early childhood, indicated by the ages of the sleeping children, this girl has been accustomed to behold in this assailant her only protector and guardian. She has been accustomed from her earliest childhood, not only herself to yield obedience, but to see all others in the domicile yield obedience to this man, who stood to her in the relation of a father, and her feelings of consternation may be imagined when, taking her hands and holding them, he told her if she told her mother he would whip her, and then placing his private parts in contact with her private parts, forced her.

This assailant was scarcely in a position to obtain the consent of his step-daughter; and if he, against her directions to the contrary, entered her bed and seized her hands and had sexual intercourse with her against her consent, by force, the crime is complete.

Should he be permitted to shelter himself behind the circumstance that she made but little actual resistance, and no outcry, under circumstances, to her, so confusing and so intimidating? There he was, one in authority, standing over her. He had come stealthily back from this party on a predetermined errand. He had contrived to have her protectors, as against him, well out of the way, and was present announcing his lustful purpose, with full power to execute it against her will.

That she felt herself in his power, and took too much counsel of her fears and her helplessness, is a matter that he cannot plead in extenuation of his crime. But it is objected that the words used do not prove penetration of her body. Penetration is essential to complete this crime, and if there is no penetration there is no rape. But what is essential to the proof of penetration? It is proved in this case that the prisoner, getting into bed with the object of his desires, held her hands, brought his private parts in contact with her private parts, and forced her. The word "penetration" is not used; neither is it used in the received definition of the crime of rape stated above, and to be found in all the authorities, nor is it used in the statute cited. While it is an essential element of the crime of rape, and without it there can be no rape, yet proof of the carnal knowledge of a female against her will, by force, is proof of rape.

The words used by the prosecutrix can have no other signification than that, under the narrated circumstances, the

prisoner accomplished the sexual intercourse sought by him. But if there can be any doubt of this upon the evidence of the girl, the evidence of the witness Collins must settle the question of whether there was complete sexual intercourse. He testifies, and he is unimpeached, that the prisoner told him, when brought before him as a magistrate, upon the complaint of the girl, that the girl was no kin to him, and he had sexual intercourse with her, and that he wanted to be first. This is an admission by the prisoner that he had sexual intercourse with the girl, and that so far as his knowledge went, she was a person of previous chaste character. The proof of the crime is thus rendered complete.

Witnesses are called to impeach the prosecutrix, but they are contradicted by others called by the commonwealth, and the jury passed upon this conflict of testimony, which was their province, and their decision cannot be overruled on this point. The witness Collins is not impeached, and no such attempt is made.

We have not been unmindful in this case of that just observation by Lord Hale, "that it is an accusation easily made, hard to be proved, and still harder to be defended by one ever so innocent." The party injured is legally a competent witness; her credibility was left to the jury upon the circumstances of the case, which concur with her testimony. Whether she be a person of good fame; whether she made complaint of the injury as soon as practicable; whether her person or garments bore token of the offense, and the like;—upon these questions the jury has passed in their verdict. There do not seem to be any safe grounds upon which the judgment in this case can be set aside.

The sexual intercourse, under the circumstances of this case, make out a case of rape, and the judgment of the county court of Giles County must be affirmed.

LEWIS, P., and RICHARDSON, J., dissented.

Judgment affirmed.

RAPE, ESSENTIAL ELEMENTS OF CRIME OF: *People* v. *Croswell*, 87 Am. Dec. 774; *Smith* v. *State*, 80 Id. 355, and extended note 361-375; *Commonwealth* v. *Burke*, 7 Am. Rep. 531, and note 535; *Don Moran* v. *People*, 12 Id. 283, and note 290; *People* v. *Dohring*, 17 Id. 349; *Oleson* v. *State*, 38 Id. 366; *Whittaker* v. *State*, 37 Id. 856; aiding and abetting offense: *State* v. *Jones*, 35 Id. 586; *People* v. *Woodward*, 13 Id. 176, and note 177.

RAPE, EFFECT OF DELAY IN MAKING COMPLAINT: *People* v. *O'Sullivan*, 58 Am. Rep. 530.

JONES *v.* OLD DOMINION COTTON MILLS.

[82 VIRGINIA, 140.]

BY DEMURRING TO EVIDENCE, DEMURRANT WAIVES ALL EVIDENCE on his part that conflicts with that of the other party, admits the credit of the evidence demurred to, admits all inferences of fact that may be fairly deduced from the evidence, and refers it to the court to deduce all fair inferences from the evidence.

WRIT OF ERROR BRINGS UP WHOLE RECORD, and though the judgment below were on a demurrer to evidence, advantage may be taken of a fatal defect in the declaration.

DECLARATION IS SUFFICIENT, ALTHOUGH IT DOES NOT STATE whether the plaintiff was an employee or a mere trespasser, if it distinctly sets forth when, where, in what manner, and under what circumstances the plaintiff was injured by the default, negligence, and improper conduct of the defendant's servant, who was then and there in the care and management of certain described machinery of the defendant.

USUAL PRACTICE OF APPELLATE COURTS IS TO CONSIDER WHOLE RECORD, and pass upon errors in the order in which they were committed, and generally to reverse the judgment for any material error, not waived, without looking into the subsequent proceedings.

WHERE RIGHT VERDICT IS SET ASIDE, APPELLATE COURT WILL RESTORE IT and enter judgment thereon, and will reverse a subsequent judgment that is inconsistent with the previous right verdict. But if the subsequent judgment be consistent therewith, it will be affirmed. Yet if the plaintiff was entitled to a judgment on the first verdict set aside on the defendant's motion, he is entitled to a judgment on the last verdict, where both arrived at the same result, the only difference being that the last verdict found a larger amount of damages in the plaintiff's favor.

PRACTICE — JUDGMENT ON LAST VERDICT. — The plaintiff had two verdicts in succession, in his favor, for damages for an injury sustained through the negligence of the defendant. Each verdict was, in its turn, set aside on the defendant's motion. A third verdict was rendered in favor of the plaintiff, giving a larger amount of damages, subject, however, to the defendant's demurrer to the evidence, which the court below erroneously sustained. *Held*, that the plaintiff was entitled to judgment on the last verdict.

MASTER IS NOT LIABLE, AS GENERAL RULE, TO ONE SERVANT for an injury resulting from the negligence of a fellow-servant. Exceptions to the rule are as follows: 1. Where the injury results from exposing the servant to risks not arising out of his contract of service or employment; 2. Where the negligent servant, whatever his grade or title, exercises supervision or control over the injured servant, they are not fellow-servants in a common employment, and the principal must answer for the negligent acts of the former, whereby the latter was injured without fault on his part; 3. Where the principal undertakes to run dangerous machinery with insufficient help, and the servant is thereby injured.

NEGLIGENCE — APPLICATION OF PRINCIPLE OF RESPONDEAT SUPERIOR. — The plaintiff, a boy thirteen years of age, was in the service of the defendant corporation, being engaged in the weaving department of its cotton mills, "to sweep the floor, carry water, and fill the buckets with quills." The dangerous machinery of the weaving department was at

the time being operated with insufficient help, and an employee of the defendant, acting as its agent, called on the plaintiff for help, and ordered him into a position of danger, the result of which was irreparable injury to him. *Held*, that the defendant corporation was liable in damages for the injury sustained by the plaintiff.

ACTION of trespass on the case, brought by an infant, suing by his next friend, to recover damages caused by the alleged negligence of the defendant's agent. There were three jury trials, and three successive verdicts, all in favor of the plaintiff and differing only as to the amount of the damages. The third verdict, giving the plaintiff the largest amount of damages, was rendered subject to the opinion of the court on the demurrer to evidence filed by the defendant. The court sustained the demurrer and gave judgment for the defendant, to which judgment the plaintiff excepted. Other facts appear in the opinion.

Meredith and Cocke, and W. W. Cosby, for the plaintiff in error.

W. W. Gordon, and Friend and Davis, for the defendant in error.

By Court, RICHARDSON, J. Applying the settled rule that "by demurring to the evidence the demurrant waives all evidence on his part that conflicts with that of the other party, admits the credit of the evidence demurred to, admits all inferences of fact that may be fairly deduced from the evidence, and refers it to the court to deduce the fair inferences from the evidence," as laid down by this court in *Trout* v. *Virginia etc. R. R. Co.*, 23 Gratt. 637, we proceed to state and examine the following facts of the case:—

On the 28th of October, 1880, and for some years before, the defendant company was the owner of a cotton mill in Manchester, and in the fall of 1879, by its agent, Alexander Thomas, first boss of the weaving department, employed the plaintiff, then a boy of twelve years, "to sweep the floor, carry water, and fill the buckets with quills." At the time of his employment, and on the day the injury complained of was received, the weaving department consisted of three rooms, all under the general management of the first boss, Thomas. In each of these rooms was a second boss, or overseer, their general duties being to see that the hands in their rooms were not idle, and to repair and keep in order the machinery running in their respective rooms; yet on occasions their power

was more extended,—that is to say, when a second boss of one room came for a legitimate purpose into another room and found the second boss of that room, and also the first boss, absent, it was expected of him in such absence to put in order any machinery then needing repairs, and on such occasions he would be in authority in that room.

The two rooms in this weaving department necessary now to be spoken of were on the third and fourth floors of the mill, respectively. In the room on the third floor, one Waymack was second boss, and in the room on the fourth floor, one Eastwood was second boss, his room being immediately over that of Waymack. In Waymack's room, near the ceiling, ran iron rods, commonly called lines of shafting, on which were iron wheels, called pulleys. The motive power which ran the looms in both Waymack's and Eastwood's rooms was derived from the same said lines of shafting,—that is, the looms in Waymack's room were run by leather belts running from pulleys on said shafting down to other pulleys on the looms in that room; and the looms in Eastwood's room were run by belts running from certain pulleys on said shafting up through the floor of his room to pulleys on the looms of his room.

Besides the female operatives working the looms, it was necessary, in order to run the weaving department properly, to have in the three rooms composing that department seven male hands,—that is, the first boss, and in each room a second boss and helper, or boy, like the plaintiff. On the twenty-eighth day of October, 1880, the day of the injury complained of, it was attempted to run that department with not more than four such hands,—that is, with Waymack, one second boss absent, with the helper, or boy, in Eastwood's room, absent, and with Phillips, second boss in the third room, absent. Waymack had been granted leave of absence to visit the agricultural fair. So, on the day of the accident, Thomas, first boss, had not only to perform his regular duties of superintending all these rooms, but had also to act as second boss in two rooms,—one on the first and the other on the third floor. A more fitting occasion could seldom arise for Eastwood's authority to be more extended than usual. He was the only second boss on hand to assist the first boss, Thomas.

The accident occurred thus: One of the belts which ran a loom in Eastwood's room broke and fell down into Waymack's room through the hole in the floor. As was his duty, East-

wood went down into Waymack's room to get his belt; he pushed it up, went back to his own room, dropped the end of it through the hole in the floor, ran a chisel across the hole and let the belt hang down suspended across the chisel. As was necessary, he then again went down into Waymack's room to fasten the two ends of the belt together. He picked up a step-ladder near the door of entrance to Waymack's room and went on with it towards the middle of the room, where he had to fix the belt. When within thirty or forty feet of the place, he saw Thomas, first boss, go out of the room. It did not occur to him to call Thomas, and it is doubtful whether Thomas, owing to the great noise of the looms in motion, could have heard the call had it been made. When he got to the belt, Eastwood put the step-ladder down, put one end of the swinging belt over its pulley, rivited together its ends, and called the plaintiff to come to him. After a few unimportant words with plaintiff, Eastwood ordered plaintiff to "stand on this step," meaning the second step of the ladder, and hold up the swinging belt whilst he, Eastwood, went upstairs and flattened the rivet. He left plaintiff standing on said second step. It was necessary to have some one to hold up the belt in order to keep it from wrapping around the shafting and doing damage. The step-ladder was "a shackling one"; it was placed just under the line of shafting, on which was the pulley on which Eastwood's belt ran. Four looms were about the base of the ladder, two on each side of it. The four belts on these looms ran obliquely up to this same line of shafting. Two of the belts, that ran across the front of the ladder, converged more and more closely together until they reached the pulley on which they both ran. The other two belts, that ran across the back of the ladder, converged in the same way until they reached the pulley on which they ran. The two pulleys on which these four belts ran were about two feet apart, and between them was the pulley on which Eastwood's belt ran. The four belts thus converging would, of course, bring them all closer to a person the higher he was up the ladder. The plaintiff's position, on the second step of the ladder, brought his arms in close proximity to two of the converging belts, for he was ordered to stand on the ladder and hold the swinging belt wide apart, so that the side over the pulley would not wrap over it. The position in which the plaintiff was placed was one of extreme danger, especially for a boy of thirteen years, with no experience and no warning of the danger. The danger to this

boy, holding one belt likely to jerk him into the shafting and surrounded by four converging belts, was increased by the fact that the belts were not laced together with a strip of leather, but were riveted with metal hooks, which increased the danger of his being caught in the belts.

When Eastwood went back to his room to fasten the rivet, before drawing the belt up, he had scarcely reached it when he heard a heavy thud against the floor, and dust flew in his face. Fearing an accident had happened, he ran back to Waymack's room, and found plaintiff caught up in this iron shafting, with three belts wrapped around him, and two girls pulling on his hanging feet, to keep him from further injury. Eastwood partly stopped the machinery, cut away the belts, and took plaintiff down. It was found that, having been violently jerked up against the floor, and wrapped about the revolving pulleys, he was greatly bruised and injured, and his right arm horribly lacerated,—all the muscles and sinews of the under part of the arm torn and destroyed. The arm was not amputated, but was rendered permanently useless.

The plaintiff, when employed, had been placed in Waymack's room, but was not given orders to obey Waymack only. On several prior occasions he had done work for Eastwood at his command. On the day of the accident he was working as helper in both rooms, in the absence of the regular helper in Eastwood's room. When he was ordered by Eastwood to help about the belt, neither Thomas nor Waymack was present. Eastwood had repaired machinery in Waymack's room that morning. On other occasions, when Waymack was absent, Eastwood had been sent to Waymack's room by first boss Thomas to take charge of it. The mill had no printed rules. Eastwood, when fixing the belt, was doing an act within the scope of his duty or employment. He needed and was entitled to assistance, as the fixing of the belt required two, and he was empowered to call for assistance. Had Waymack been present, it would have been his duty to render the necessary aid. Had Thomas, the first boss, been there, it would have been his duty to assist. Eastwood also had the right to call on his own helper or boy. In the absence from the room of both Thomas and Waymack, Eastwood, under the circumstances, and in the course of his employment, had authority over the plaintiff, who was in the room, who was ordered to assist, and who, though but an inexperienced boy, was placed by Eastwood in a position of extreme peril; and

in thus obeying Eastwood, received the injury which disabled him for life. For this act, Eastwood was not discharged, nor even reprimanded, although he communicated the fact to his first boss, Thomas, who had employed him, ten minutes after the occurrence. On the morning after the accident, Eastwood's act was approved of and ratified by Robertson, the superintendent of the mill, who ran the entire business, established rules, prescribed duties, and could discharge any employee. He told Eastwood he had only done his duty.

As already stated, the court below held that the case thus made by the evidence was not sufficient in law to entitle the plaintiff to a judgment in accordance with the last verdict. It is, then, for this court to pass on that judgment; but before doing so, let us look to the plaintiff's declaration, which contains two counts, to each of which, as well as to the declaration as a whole, the defendant demurred.

It is insisted for the appellant that the court below should have sustained the demurrer to the first count, and it is necessary that this question be here examined into, as a writ of error brings up the whole record, and though the judgment below were on a demurrer to evidence, advantage may be taken of a fatal defect in the declaration: *Bank of United States* v. *Smith*, 11 Wheat. 171.

Was there such defect? It is undoubtedly true, as said by Green, J., in *Dykes* v. *Woodhouse*, 3 Rand. 300, that "the plaintiff's declaration must state enough to show, if true, and not avoided by the plea, that the defendant is necessarily liable to the plaintiff's demand." It is also true that where "the declaration amounted to an averment simply, — that the plaintiff's intestate was injured by the negligence of the defendants in the operation of their business in using and employing their engines and cars on their railways," without stating "the manner in which the plaintiff was injured," so that "it was impossible for the defendant to learn from it the ground upon which the plaintiff was proceeding," as was the case with the second count of the plaintiff's declaration in *B. & O. R. R. Co.* v. *Whittington*, 30 Gratt. 805, — such declaration is insufficient.

But on examining the declaration in the case in hand, we do not find either count open to the objection that it fails to set forth fully the facts which constitute the cause of action, so that they may be understood by the party who is called on to answer them, by the jury to ascertain the truth of the alle-

gations, and by the court to pass judgment: 1 Chitty's Pleading, 256.

The first count, it is true, does not state whether the plaintiff was an employee or a mere trespasser, but it certainly does state, and distinctly set forth, when, where, in what manner, and under what circumstances—giving ample details—the plaintiff was injured by the default, negligence, and improper conduct of the defendant's servant, who was then and there in the care and management of certain described machinery of the defendant. This is all that seems necessary to fulfill the office of a declaration. It is noteworthy that this count accurately corresponds in its material features with the declaration in the similar case of *N. & P. R. R. Co.* v. *Ormsby*, 27 Gratt. 700.

No particular fault is attributed to the second count, nor do we find any in it. Therefore we are of opinion that the hustings court did not err in overruling the demurrer to the declaration.

Now, as to the several verdicts and judgments in this case, it may be said that it is the usual practice of appellate courts to consider the whole record, and to pass upon errors in the order in which they were committed, and generally to reverse the judgment for any material error, not waived, whereby the party appealing may have been aggrieved, without looking into the subsequent proceedings; and in adopting and applying this rule, such courts act upon grounds of right, reason, good sense, and substantial justice, as well as of economy of time and labor, in reference to the facts of the case they are dealing with. Thus in *Briscoe* v. *Clarke*, 1 Rand. 215, at the first trial there was a verdict for the defendant, which on the plaintiff's motion was set aside. At the second trial there was a verdict and judgment for the defendant, and the plaintiff appealed. This court held that the first verdict had been improperly set aside, and without noticing any other error, affirmed the judgment in favor of the defendant.

In *Pleasant* v. *Clements*, 2 Leigh, 474, the verdict at the first trial was for the plaintiff, and was set aside on the motion of the defendant. At the second trial the verdict was in favor of the defendant, and judgment accordingly, and the plaintiff appealed. This court held that the first verdict had been improperly set aside, and entered judgment thereon in favor of the plaintiff, reversing the judgment appealed from without examination.

In *Taylor* v. *Taylor*, 21 Gratt. 700, at the first trial the verdict was for the plaintiff, and was set aside on the defendant's motion; and at the second trial, a jury being waived, and the whole case submitted to the court, judgment was entered for the defendant. On appeal, this court said: "There having been two trials in the circuit court, this court will look to the record of the proceedings in both trials, and if the court erred in setting aside the verdict of the jury, that is an error for which this court, without considering the subsequent proceedings in the case, will reverse the judgment rendered for the defendant upon the second trial, and enter final judgment in favor of the plaintiff upon the verdict of the jury in the first trial"; and cited the cases above referred to. But in that case (*Taylor* v. *Taylor*) the court found that the verdict at the first trial had not been improperly set aside, and held that the judgment in favor of the defendant at the second trial was not erroneous, and affirmed it. So it had no occasion to apply the rule it had laid down.

In *Brown* v. *Rice*, 76 Va. 629, the verdict at the first trial was in favor of the plaintiff for part of the debt demanded, and on his motion the verdict was set aside. At the second trial there was a verdict for the plaintiff for the whole debt demanded, and the defendant appealed. This court held that the verdict at the first trial, in favor of the plaintiff for part of the debt demanded, was right, and should not have been set aside, and held that all proceedings subsequent to said verdict were erroneous, and set the same aside, and entered judgment on the first verdict, as the court below should have done.

An lastly, in *Tracy* v. *Barksdale*, 33 Gratt. 342, at the first trial there was a verdict for the defendant, which was set aside on the plaintiff's motion. At the second trial there was a verdict for the defendant, and judgment accordingly. This court held that the first verdict had been erroneously set aside, and without inquiring into the proceedings at the second trial, affirmed the judgment in favor of the defendant.

It may be observed that in none of the other cases did this court give any reasons for the rule thereto applied, but in the case last mentioned, Moncure, P., speaking for the whole court, said: "This court being of opinion that the circuit court erred in setting aside the first verdict rendered by the jury in favor of the defendant, and in not overruling the plaintiff's motion to set aside that verdict, and not rendering a judgment in

conformity with that verdict; and this court being further of opinion that the said circuit court, in deciding and rendering judgment in favor of the defendant on the second trial, arrived at the same result as if it had decided and rendered judgment in favor of the defendant on the first trial,—it is therefore unnecessary to inquire now if the said court erred in rendering the judgment which it did render on the second verdict, considered without reference to the action of the court on the first verdict; but without doing so, it is sufficient and only necessary for this court to affirm the judgment of the circuit court, to which the writ of error was awarded in this case, which is therefore accordingly done." The meaning of all which is, that the defendant was entitled to judgment on the first verdict and as the judgment given for him on the second verdict arrived at the same and the proper result, the court approved the judgment.

By comparing the particulars of the several cases above referred to, it is easy to comprehend the principle upon which, in such cases, appellate courts act, though it may be difficult, if not impossible, to formulate a rule for universal application. It is obvious, however, that where a right verdict is set aside, the appellate court will restore it and enter judgment thereon, and will consequently reverse, without special examination into the proceedings, a subsequent judgment that is inconsistent with the previous right verdict. But where the subsequent judgment is not inconsistent with the previous right verdict, the court will, without noticing any later error, merely affirm the subsequent judgment, as this court did in the case of *Briscoe* v. *Clark* and *Tracy* v. *Barksdale*, *supra*. The principle is applied to subserve the ends of justice, and not in mere servile obedience to any arbitrary technical rule.

So, applying this principle to the case at bar, it follows that if the plaintiff in error was entitled to a judgment on the first verdict, which was improperly set aside on the defendant's motion, he is entitled to a judgment on the last verdict, as they both arrived at the same result, — that is, that he had received an injury for which the defendant was responsible in damages, — the only difference being that the amount assessed as damages in his favor by the first jury was less than the amount assessed in his favor by the last jury. In *Brown* v. *Rice*, *supra*, the verdict at the first trial was for the plaintiff for part of his demand. This court held that verdict to be right, and therefore it followed, without saying, that the ver-

dict at the second trial, in favor of the plaintiff for the whole of his demand, was wrong. Hence the judgment entered on the last verdict was reversed, and a judgment entered by this court on the first verdict, which this court held to be for the true amount. In that case, however, the question in litigation was the true amount of the debt, whilst in this case the question is, primiarily, whether or not the defendant is liable at all in damages to the plaintiff for the injury alleged to have been received by him; and secondarily, if liable, what shall be the amount of the damages? — the last being a question exclusively for the jury, and which, by their last verdict, they fixed at seven thousand dollars, subject only to the judgment of the hustings court upon the law as to the defendant's liability at all for any amount whatever. The question before the court was not whether the amount of the verdict was proper, but whether any verdict whatever under the law applicable to the case was allowable against the defendant company.

It is quite plain that the facts of the cases above referred to are not the same as, or even similar to, the facts of the case in hand. Here there were three successive verdicts, all in favor of the plaintiff, and differing only as to the amount of the damages. Each verdict was, in its turn, set aside on the motion of the defendant; and two new trials having been granted it, — that is, as many as under the statute (Code 1873, c. 173, sec. 15) could be granted the same party in the same case, — the defendant shrewdly withdrew the decision of the matters in issue from the jury by a demurrer to the evidence, and the hustings court, adhering to its former decisions on the verdicts previously rendered in the cause (so far as the evidence at the several trials was the same), set aside the third and last verdict, and turned the plaintiff out of court with a bill of costs to pay.

Now, if upon the law of the case (or of the several cases as made out by the evidence adduced at the several trials), the plaintiff is entitled to recover damages of the defendant company for the injury received by him as alleged in the declaration, it is pertinent to inquire, Is it reasonable that the defendant company should be heard to complain of being required to pay the amount of damages assessed by the last jury, a tribunal sought and appealed to by the defendant company on its own motion, and to insist on the application of what, in this instance, would be a mere technical rule under

which the defendant company might be enabled, through no fault of the plaintiff, to escape the consequences of its liability for said injury, with the payment of only the less amount of damages assessed by the first jury, and thus, in effect, to make it practicable, as well as profitable, to take advantage of its own wrong?

By such course, the defendant company would be allowed the benefit of the chances that the succeeding juries would find against it either no damages, or less damages than the first jury found; and when, as in this case, each successive jury gives larger damages, then the result would be to allow the defendant, as a choice of evils, to return to the first verdict as least onerous. It is therefore apparent that to apply the rule here, as it was applied in *Briscoe* v. *Clarke*, and other cases, *supra*, would be to offend against every principle of sound reason, good judgment, and substantial justice; though doubtless the rule in question was appropriately applied in those cases.

But another obvious reason exists for first considering the questions arising on the demurrer to evidence on the last trial. Notwithstanding this demurrer, it is admitted that the defendant company was entitled to have a decision on its demurrer to the plaintiff's declaration, and got it. But it is manifest that in all other respects, and certainly as respects all questions as to the sufficiency of the evidence, so far as that evidence was the same, and in the main it was the same at the several successive trials, the demurrer filed by the defendant company to the evidence at the last trial merged and consolidated the entire case, and presented to the court for decision the one question, whether or not the plaintiff's evidence, considered in the light of the principles which govern demurrers to evidence, was sufficient to maintain on his part the issue joined.

For these reasons, and passing by the question as to the propriety of the hustings court requiring the plaintiff to join in the demurrer to evidence, we are of opinion that it is proper, first, to consider and decide the main question, Should the hustings court have sustained the demurrer to the evidence?

The general rule that the master is not liable to one servant for an injury resulting from the negligence of a fellow-servant has been recently so fully considered by this court in the case of *B. & O. R. R. Co.* v. *McKenzie*, 81 Va. 71, in the cases of *N. & W. R. R. Co.* v. *Fergusson*, 79 Id. 241, *R. & D. R. R. Co.*

v. *Moore*, 78 Id. 93, and *Moon* v. *R. & A. R. R. Co.*, 78 Id. 745, 49 Am. Rep. 401, and in numerous other cases, that a discussion of the question is unnecessary, except so far as pertinent to determine its application to the facts of the case here in hand. It is well known that this doctrine was first promulgated in England in 1837, in South Carolina in 1841, and in Massachusetts in 1842, and was generally adopted in this country; but exceptions and modifications have become as well established as the rule itself; and this by many decisions, of which the recent one by the supreme court of the United States in *Railway Co.* v. *Ross*, 112 U. S. 377, and that of this court in *Moon* v. *R. & A. R. R. Co.*, *supra*, it may be said, to the extent of ingrafting on the rule such limitations and qualifications as best accord with reason and justice.

Several of the exceptions appear to proceed only from close scrutiny and strict construction of the language of the rule. Several, however, are outside the language, but are derived from the reason of the rule. "This rule proceeds on the theory," says Mr. Justice Davis in *Railroad Co.* v. *Fost*, 17 Wall. 553 (a case strikingly like the one under consideration), "that the employee is presumed to take upon himself, in entering the service of the principal, the risks incident to the undertaking, among which are to be counted the negligence of fellow-servants in the same employment, and that considerations of public policy require the enforcement of the rule. But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it."

The risks, then, which the servant actually assumes are only those arising out of his contract of service or employment: Cooley, J., in *Railway* v. *Bayfield*, 37 Mich. 205, and the cases there cited.

The negligent acts, the risk whereof the servant takes, are those of a fellow-servant in the same common employment, and not of a negligent servant so far occupying, as to the injured servant, the position of his principal, as to render the latter chargeable for his negligence as a personal fault: Cooley on Torts, 561. In *Moon* v. *R. & A. R. R. Co.*, *supra*, it is said: "Where a company delegates to an employee the performance of duties which the law makes it incumbent on the company to perform, his acts are the acts of the company, his negligence the negligence of the company." And in that case, as in the case of *Railway Co.* v. *Ross*, *supra*, the company was held

liable for an injury done to a brakeman by the negligence of the conductor of the train. And a foreman having charge of the machinery or its repairs is in legal effect the master: Pierce on Railroads, 368, 369. Where the negligent servant, whatever his grade or title, exercises supervision or control over the injured servant, they are not fellow-servants in a common employment, and the principal must answer for the negligent acts of the former whereby the latter was injured without fault on his part: *Flike* v. *B. & A. R. R. Co.*, 53 N. Y. 549; 13 Am. Rep. 545; *Railroad Co.* v. *Ross*, *supra*.

Another well-sustained exception to the general rule of the principal's exemption from liability is where he undertakes to run dangerous machinery with insufficient help: Pierce on Railroads, 372, note; *Flike* v. *B. & A. R. R. Co.*, *supra*; *Booth* v. *B. & A. R. R. Co.*, 73 N. Y. 38; *Snow* v. *Housatonic R. R. Co.*, 8 Allen, 441; 85 Am. Dec. 720.

In the case at bar, the plaintiff, a boy of thirteen years of age, with little experience and familiarity with machinery, and hired from his father by the defendant company "to sweep, carry water, and fill the buckets with quills" in the weaving department of its cotton mills, was ordered into the position of danger already described, by one in the employment of the company, and under the circumstances, on that occasion necessarily representing the company. When the injury occurred to this boy, he was not doing the work his father engaged him to do. On the contrary, he was at the time employed in a service outside the contract, and wholly disconnected therewith. To sweep, carry water, and fill buckets with quills is quite a different thing from standing on a ladder and holding up a heavy belt, surrounded by the belts of four looms in dangerous proximity to his person, and these belts plying over pulleys making over a hundred and twenty revolutions per minute. The one is the work of a boy, and within the compass of a boy's strength and experience; the other requires the strength, experience, and judgment of a man, and is a man's work, to say the least. Thus situated, holding up and aiding to adjust a displaced belt that ran a loom in the upper room, the plaintiff received the injury which makes him a comparatively helpless cripple for life. Neither he nor his father, when the contract of service was made, had any ground to expect that he would be called on to encounter any such peril.

Eastwood, the second boss, was intrusted with the care,

management, and repair of the machinery, in connection with the repairs of which this shocking accident occurred. He needed help to mend a broken belt, and readjust displaced machinery. There was no one present in the room when the adjustment was to be effected except this boy, the plaintiff in error. Eastwood, by the usage of this company's employees, was not only empowered, but in the nature of things had authority, to call to his assistance this boy, who never for a moment doubted his authority, or hesitated to obey. In mending the belt, and readjusting the machinery, Eastwood was performing a plain duty he owed his principal, and was acting within the scope of his employment. Only four of the seven male hands ordinarily required to run the machinery of the weaving department were on duty that day, the others being absent on leave. In attempting to run the machinery with an insufficient number of hands, Eastwood was compelled, in the course of his regular duty, to call for help. He called this boy, and ordered him into a position of danger, the result of which was irreparable injury to him. In so doing, Eastwood was the representative of his principal, and his order, his negligent want of proper care and caution, was the negligent order and want of proper care of Eastwood's principal; and liability for the consequences cannot be avoided by the contention that Eastwood had no authority, and should not have given the order. The defendant company is liable on the plain principle of *respondeat superior*, Eastwood being then and there its *alter ego:* Wharton on Law of Negligence, sec. 232; *Malone* v. *Hathaway*, 64 N. Y. 642; 21 Am. Rep. 573.

The company is also liable on the ground that by the act of its agent it exposed the boy to perils outside the ordinary risks incident to his contract of service: *Railroad Co.* v. *Fost*, *supra; Labor* v. *Railroad Co.*, 52 Ill. 401.

It is likewise liable on the ground that by the attempt to run the dangerous machinery of the weaving department with an insufficient number of hands the occasion arose which contributed to produce, if it did not directly cause, the injury to this boy employee: Pierce on Railroads, 369; *Booth* v. *Boston etc. R. R. Co.*, 73 N. Y. 38.

It is needless to prolong the discussion. We are clearly of opinion that the hustings court erred in sustaining the defendant's demurrer to the evidence, and that its said judgment must be reversed, and judgment entered here for the plaintiff.

In the view thus taken of the demurrer to the evidence, it is unnecessary to look to other questions raised in the record.

LACY, J., dissented.

Judgment reversed.

DEMURRER TO EVIDENCE IS NO LONGER IN USE IN NEW YORK: *Colegrove* v. *New York etc. R. R. Co.*, 75 Am. Dec. 418.

WRIT OF ERROR, WHEN IT LIES: *Haight* v. *Gay*, 68 Am. Dec. 323, and note 325; *Moreau* v. *Saffarans*, 67 Id. 582; *Union Church* v. *Sanders*, 63 Id. 187.

DUTY OF MASTER TO INFANT OR MINOR EMPLOYEE WITH RESPECT TO RISKS incident to the employment: *Fisk* v. *Railroad Co.*, 1 Am. St. Rep. 22, and extended note 28.

MASTER AND SERVANT — NEGLIGENCE OF FELLOW-SERVANTS: *Philadelphia Iron etc. Co.* v. *Davis*, 56 Am. Rep. 305; *Cone* v. *Delaware etc. R. R. Co.*, 37 Id. 491; *Luebke* v. *Railroad Co.*, 53 Id. 266; *O'Brien* v. *Railroad Co.*, 52 Id. 279, and note 280; *Pittsburgh R. R. Co.* v. *Kirk*, 52 Id. 675; *Adams* v. *Coal*, 50 Id. 211; *Pennsylvania etc. R. R. Co.* v. *Mason*, 58 Id. 722, and note 725.

DORR *v.* ROHR.

[82 VIRGINIA, 859.]

NOTICE, AND OPPORTUNITY TO BE HEARD, ARE ESSENTIAL REQUISITES TO JURISDICTION of all courts, even in proceedings *in rem*, and judgment without jurisdiction is a nullity.

ORDER OF PUBLICATION MADE IN VIRGINIA, DURING WAR BETWEEN CONFEDERATE STATES and United States, upon a resident of the state of New York, could not constitute notice, either actual or constructive, and would be without any legal effect. And without legal notice given to the non-resident defendant, the court could not acquire jurisdiction of the fund attached by service of process on the garnishee with the attachment order indorsed thereon.

JURISDICTION — STATUTE OF LIMITATIONS. — Proceedings in an attachment in equity were instituted in a Virginia court, in July, 1861, against a non-resident debtor in the state of New York, and a garnishee resident in Virginia. Service of process was made on the latter, and an order of publication was made against the former. The subject of suit was within the five years' limitation of the Virginia statute. The non-resident debtor in New York was brought into the case by amended bill, in December, 1879, and interposed the plea of the statute of limitations. *Held*, — 1. That the proceedings against him under the order of publication, being void, did not suspend the running of the statute, 2. That the defendant being a citizen and resident of New York, the case was not within the saving clause of the statute (Va. Code 1873, c. 146, sec. 20), which applies to a debtor "who had before resided in this state"; 3. No defense having been raised by replication in the court below, to the statute of limitations, it is too late to make it for the first time in the appellate court.

Id. — SEQUESTRATION — STATE COURT CANNOT ENJOIN DECREE OF FEDERAL COURT. — In 1859, Preston was indebted to Dorr, and secured the debt by trust deed to Gibboney. This debt Rohr sought to attach when he instituted this suit in July, 1861. In 1862 the Confederate States court sequestrated this debt, on the ground that it was due to an alien enemy, to wit, Dorr, a citizen of New York. On suggestion that this debt had been attached in the Rohr suit, the confederate court directed Gibboney to pay the money to the receiver, to be loaned out, and it was accordingly paid to the receiver, who loaned it to Rohr. Subsequently, by a decree of the court below, Rohr was adjudged to be entitled to the money as a credit on the alleged indebtedness of Dorr to him. In May, 1878, Dorr obtained a decree in the United States circuit court against the estate of Gibboney, for the full amount of the Preston debt. In the progress of the cause, the executrix of Gibboney asked and obtained leave to file a cross-bill, alleging that her testator, in his lifetime, had in effect paid the Preston debt, as garnishee, into the state court, though in fact he had paid it to the receiver of the Confederate States, under an order of the confederate court; and the prayer of the cross-bill was granted, namely, that the appellant, as Dorr's administrator, be "perpetually enjoined from proceeding to collect the principal and interest decreed by the circuit court of the United States." *Held*, that this was erroneous: 1. The court below acquired no jurisdiction, either of the person or property of Dorr, and the case, as against Dorr's estate, is as if no process of garnishment had been issued at all; 2. The order of the Confederate States court would afford no protection to the trustee of Gibboney, in a suit against him by the rightful owner of the fund sequestrated; 3. Moreover, a judgment or decree of a federal court cannot be enjoined by a state court, or *vice versa*.

JURISDICTION OF COURT IS NOT EXHAUSTED until its judgment is satisfied.

APPEAL from the circuit court of Washington County. Proceedings had in an attachment in equity. The material facts appear in the head-note and opinion.

J. H. Gilmore and Ro. M. Hughes, for the appellants.

Fulkerson and Page, J. H. Wood, J. W. Caldwell, and A. H. Blanchard, for the appellees.

By Court, LEWIS, P. Among the errors assigned is the action of the circuit court in overruling the plea of the statute of limitations filed by the appellant as the administrator of the defendant Dorr; and we are of opinion that the assignment is well taken.

In computing the time for the running of the statute, the suit must be deemed to have been commenced, as against Dorr, when he was brought in by the amended bill in December, 1879. At that time, the claims asserted in the bill were clearly barred, if they were ever valid. The suit was not founded on the sealed contracts between the parties, but was

for work and labor done, and other items, as to which the five years' limitation prescribed by the statute is applicable.

It appears that Rohr, the plaintiff, was a subcontractor under Dorr & Co. to build certain sections of the Virginia and Kentucky railroad. There were two contracts under seal between the parties,—one executed in 1857, the other in 1860. The present suit was originally instituted in July, 1861. To the bill, one Robert Gibboney, trustee, and various other persons alleged therein to be debtors of the defendant Dorr, were made parties defendant. At the same time an attachment was issued against the estate of Dorr as a non-resident defendant, and there was an order of publication; but Dorr was a citizen and resident of the state of New York, and could not, therefore, be lawfully proceeded against by an order of publication. For the war was then raging, and all communication between the inhabitants of the Confederate States on the one hand, and of those states adhering to the Union on the other, was prohibited by law. Hence the execution of the order of publication was without any legal effect whatever. It did not constitute notice, either actual or constructive. The non-resident defendant, had he seen the order as published, could not have lawfully obeyed it, even if he had had the physical power to have done so; and consequently all proceedings founded upon it are void. This is well settled, both on principle and authority.

"It is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him": Chief Justice Marshall, in *The Mary*, 9 Cranch, 126. "It is a rule, founded on the first principles of natural justice, that a party shall have an opportunity to be heard in his defense, before his property is condemned": *Windsor* v. *McVeigh*, 93 U. S. 274. "It lies at the very foundation of justice that every person who is to be affected by an adjudication should have the opportunity of being heard in his defense": *Underwood* v. *McVeigh*, 23 Gratt. 409. "A different result would be a blot upon our jurisprudence and civilization": *McVeigh* v. *United States*, 11 Wall. 259.

In *Dean* v. *Nelson*, 10 Wall. 158, the case turned on the validity of certain proceedings to forelose a mortgage, taken during the war within the Union lines, whilst the defendants were absent from home within the confederate lines, and were not permitted to return. Notice to appear was published in

accordance with the laws of Tennessee, where the proceedings were conducted; and the defendants not appearing, an order of foreclosure was accordingly made. The supreme court held the proceedings to be void. "The defendants," said the court, "were within the confederate lines at the time, and it was unlawful for them to cross those lines. . . . . A notice directed to them and published in a newspaper was a mere idle form. As to them, the proceedings were wholly void."

The case of *Lasere* v. *Rocherean*, 17 Wall. 437, is to the same effect.

In *Earle* v. *McVeigh*, 91 U. S. 503, certain judgments were held to be "absolutely void," which had been obtained during the war upon notices posted at the front-door of what had been the defendant's "usual place of abode" in the city of Alexandria, after the occupation of the city by the federal forces, and seven months after the defendant, with his family, had left the city and taken up his residence within the confederate lines, where he remained until the war was over. The court in its opinion again declared it to be "a maxim of universal application," that "no man shall be condemned in his person or property without notice, and an opportunity to be heard in his defense."

In other words, notice and an opportunity to be heard are essential requisites to the jurisdiction of all courts, even in proceedings *in rem*, and judgment without jurisdiction is a nullity: *Galpin* v. *Page*, 18 Wall. 350; *Ex parte Lange*, 18 Id. 163; *Fultz* v. *Brightwell*, 77 Va. 742; 1 Smith's Lead. Cas., 8th Am. ed., 1156, notes to *Crepps* v. *Durden*.

It is needless to cite further authority to show that the circuit court did not acquire jurisdiction of the person of the non-resident defendant by any of the proceedings that were had during the war. And assuming that jurisdiction was acquired of the person of the garnishee, Gibboney, who, being within the territorial limits of the court, was summoned to answer, yet no decree could be rendered affecting the fund in his hands belonging to the non-resident defendant, which could bind the latter without his being a party to the suit.

It is contended, however, by counsel for appellees, that jurisdiction of the *res*—that is, the fund attached—was acquired by service of process on the garnishee with the attachment order thereon indorsed, and that further notice was not essential to maintain the jurisdiction. But this position is altogether untenable.

It is true that attachment being a summary remedy, a seizure of the estate of a non-resident defendant, or the levy of an attachment upon it, may precede the giving of notice. But by the express provisions of the statute, now contained in section 20 of chapter 148 of the code (1873), notice is required to be given to the debtor; and if under such circumstances as existed during the late war it becomes legally impossible to give notice, the jurisdiction as to him comes to an end. It is the same in legal effect as if under ordinary circumstances no attempt were made to give notice at all, or as if jurisdiction having been acquired and notice given, a hearing were denied, as was actually the case in *Windsor* v. *McVeigh*, and in *Underwood* v. *McVeigh*, *supra*, in both of which cases the proceedings were held to be void, and therefore impeachable collaterally.

Another answer to the position of the appellees is, that the attachment was issued under the eleventh section of the above-mentioned chapter of the code, which provides that "at the time of or after the institution" of a suit against a non-resident defendant, an attachment may be sued out, etc., and here, for the reasons already stated, the suit as against Dorr had not been lawfully commenced when the attachment issued.

The theory upon which, in proceedings purely *in rem*, a seizure is notice and gives jurisdiction is, that the *res*, if not in the possession of the owner himself, is intrusted to an agent, who has the power, and whose duty it is, to represent the owner and protect his interests. But assuming that an attachment proceeding is of a complex character, and in some of its features partakes of the nature of a proceeding *in rem*,—*St. Claire* v. *Cox*, 106 U. S. 350; 2 Smith's Lead. Cas., 8th ed., pp. 965 et seq.,—can such a principle apply to a case like the present? Does a garnishee represent his creditor, the principal defendant? And did service of process on the garnishee in the present case, any more than the order of publication, give notice to Dorr, who, being a resident of New York, could not have been lawfully communicated with? We unhesitatingly answer in the negative, and consequently no lien was acquired by the attachment which was issued in July, 1861. In other words, as against Dorr, it was unavailing for any purpose. Nor is there anything in the opinion in *Pennoyer* v. *Neff*, 95 U. S. 714, in conflict with this view.

The case of *Cooper* v. *Reynolds*, 10 Wall. 308, has no application to the question before us. It was not decided in that

case that a judgment where there is an attachment, a seizure of the *res*, is good, though no other notice be given, for there the attachment was issued and notice was published "according to law"; but the point decided was, that a judgment rendered in attachment proceedings which are irregular merely cannot be impeached collaterally. This is not disputed, and no such question arises in the present case. Here the proceedings in question are void, and they are assailed directly on appeal. The plea of the statute of limitations, interposed by the administrator of Dorr after the amended bill was filed, ought therefore to have been sustained. For before the plea was filed there had been no appearance or act done, either by Dorr in his lifetime, or by his personal representative after his death, by which the right to question the validity of the proceedings was waived. He was for the first time brought into the case by the amended bill, in December, 1879, which the court granted leave to file, after setting aside the proceedings subsequent to the attachment, and the claims asserted were then barred, since the running of the statute was not suspended by the previous proceedings, all of which as against him were void: *Isaacs* v. *Price*, 2 Dill. 347; *Miller* v. *McIntyre*, 6 Pet. 61.

It has been argued here, however, that the running of the statute was suspended by Dorr's departure from the state in April, 1861, and his continued absence from the state thereafter. But this argument cannot be sustained consistently with the statute which enacts as follows: "Where any such right as is mentioned in this chapter shall accrue against a person who had before resided in this state, if such person shall, by departing without the same, ... obstruct the prosecution of such right, the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted": Code 1873, c. 146, sec. 20.

Here the defendant had not before resided in this state, but, as the bill alleges, was a citizen and resident of New York. Hence the case is not within the saving of the statute above quoted: 4 Minor's Institutes, 514 et seq. Moreover, as the question was not raised by replication to the plea or otherwise in the court below, it cannot be raised for the first time in the appellate court: *Miller* v. *McIntyre*, *supra*; *Piat* v. *Vattier*, 9 Pet. 405; 1 Barb. Ch. Pr. 85.

The circuit court also erred in enjoining the appellant, as

administrator, from collecting the decree of the federal court in the case of *Dorr* v. *Gibboney's Ex'x.*

The material facts relating to the matter are these: In 1859, Thomas L. Preston executed to Robert Gibboney, as trustee, a deed of trust for the benefit of his creditors, of whom Dorr was one. The debt due by Preston to Dorr, and thus secured, amounted to $2,650. This debt Rohr, the plaintiff in the present suit, sought to attach when he instituted his suit, as we have seen, in July, 1861, and accordingly Gibboney was made a party defendant, and was summoned to answer, etc. About the same time proceedings were commenced in the Confederate States court at Abingdon to sequestrate the debt, on the ground that it was due to an alien enemy, to wit, Dorr, a citizen of New York. It being suggested, however, in those proceedings that the debt had been attached in the Rohr suit, an order was made by the confederate court directing the money to be paid by the trustee to the confederate receiver, to be by him loaned out, or invested in confederate securities, to await the decision of the Rohr suit. Accordingly, Gibboney paid the money as directed to the receiver, who loaned the same to Rohr. No further steps appear to have been taken in the matter by the confederate court. Subsequently, by a decree of the court below, Rohr was adjudged to be entitled to the money as a credit on the alleged indebtedness of Dorr to him.

After the close of the war, Dorr, ignoring the proceedings that had been had, brought his suit in the circuit court of the United States for the western district of Virginia, against the executrix of Gibboney, who in the mean time had died, and at the May term, 1878, obtained a decree for the full amount of the Preston debt, and an execution on this decree went into the marshal's hands to be levied. The case is reported in 3 Hughes, 382.

In the progress of the cause in the lower court, the executrix of Gibboney asked leave to file a cross-bill, which was granted. In the cross-bill, she alleged that her testator, in his lifetime, had in effect paid the Preston debt, as garnishee, into the state court. And she insisted that she ought to be protected by the process or order of the court against the levy and collection of the execution in the marshal's hands. When the cause came on to be heard, the prayer of the cross-bill was granted; that is to say, the appellant, as administrator, was "perpetually enjoined from proceeding to collect the principal

and interest decreed by the circuit court of the United States," as aforesaid.

This was erroneous. We have already shown that the circuit court did not acquire jurisdiction, either of the person or property of the non-resident defendant by any of the proceedings had during the war; consequently, the case, as against the appellant, stands in precisely the same attitude as if no process of garnishment had been issued at all. Besides, it appears very clearly from the record that the money was paid by Gibboney, not under an order of the state court, but to the receiver of the Confederate States, under an order of the confederate court. That order was as follows: "Confederate States, by John W. Johnston, receiver, *v.* Robert Gibboney, trustee for Thomas L. Preston. This cause came on this first day of August, 1862, to be heard, ... and it being represented to the court by the said receiver, and also by the said Gibboney, that one Phillip Rohr served process of attachment upon said Gibboney, claiming a debt against A. H. Dorr, and seeking to have the debt due from Thomas L. Preston to A. H. Dorr applied towards its satisfaction; and the said Gibboney, trustee as aforesaid, being ready to pay the money, but ignorant of the proper person to whom to make payment,—it is ordered that said Gibboney, trustee as aforesaid, pay the said debt, with interest, due to A. H. Dorr, to John W. Johnston. And it is ordered that said Johnston loan out said money, taking bond with good security; or if unable to do so, invest the same in eight-per-cent confederate bonds, or seven-per-cent treasury notes, to await the decision of the suit brought by said Rohr against said Dorr, and said Johnston is required to report to this court. And this cause is continued."

On the back of this order is indorsed the following receipt:—

"$3,137.15. Received of Robert Gibboney, trustee of Thomas L. Preston, three thousand one hundred and thirty-seven dollars and fifteen cents, paid me under the within decree.

"August 1, 1862. JOHN W. JOHNSTON, Receiver."

It is thus apparent that the case is the same in legal effect, as against Dorr's estate, not only as if there had been no process of garnishment, but as if the debt had been formerly sequestrated, and the money had been paid into the confederate treasury. And if such had been the case, it is clear, under the law as now settled, that the order of the confederate court would be no protection to the trustee in a suit against

him by the rightful owner of the fund so sequestrated: *Dewing* v. *Perdicanes*, 96 U. S. 193; *Williams* v. *Bruffy*, 96 Id. 176; *Stevens* v. *Griffith*, 111 Id. 48.

It was so decided by the circuit court of the United States, in the exercise of its rightful jurisdiction, in the case of *Dorr* v. *Gibboney's Ex'x*, *supra*, and the matter is now *res judicata*.

Moreover, a judgment or decree of a federal court cannot be enjoined by a state court. The circuit court of the United States and state courts are tribunals independent of each other, and nothing is better settled than that the one cannot lawfully intefere with the proceedings of the other. And the rule obviously applies as well after judgment or decree as at any anterior stage of the proceedings; for execution is called the life of the law, and the jurisdiction of a court is not exhausted until its judgment is satisfied.

This is a rule founded not merely in comity, but on necessity. Thus, for example, the plaintiff, in an execution issued from a court of the United States, is enjoined from collecting it by an order of a state court, or *vice versa*. He disobeys the order of injunction, and is imprisoned for contempt, whereupon the court whose process is enjoined interferes in his behalf to discharge him from custody. The result is an unseemly conflict of jurisdiction, causing not merely embarrassment in the administration of justice, but other and more serious consequences.

The question first arose in *Diggs* v. *Wolcott*, 4 Cranch, 179, and it was there held that a circuit court of the United States cannot enjoin proceedings in a state court. Indeed, the federal courts are expressly prohibited by an act of Congress, passed in 1793, from granting injunctions "to stay proceedings in any court of a state." And the prohibition extends to all cases except where otherwise provided by a law relating to proceedings in bankruptcy: R. S. U. S., sec. 720.

In *McKim* v. *Voorhies*, 7 Cranch, 279, the converse proposition was decided; namely, that a state court has no jurisdiction to enjoin a judgment of a circuit court of the United States. And these adjudications have been since recognized as correct expositions of the law on this subject. In *Riggs* v. *Johnson County*, 6 Wall. 166, the court say: "Circuit courts [of the United States] and state courts act separably and independently of each other; and in their respective spheres of action, the process issued by the one is as far beyond the reach of the other as if the line of division between them was

traced by landmarks and monuments visible to the eye." See also *Peck* v. *Jenness*, 7 How. 612; *Freeman* v. *Howe*, 24 Id. 450; *Haines* v. *Carpenter*, 91 U. S. 254; *Dial* v. *Reynolds*, 97 Id. 340; 2 Story's Eq. Jur., sec. 900.

This sufficiently disposes of the case. Other questions were discussed by counsel, but it is unnecessary to consider them. The decree will, therefore, be reversed, and a decree entered here in conformity with this opinion.

Decree reversed.

JURISDICTION OF NON-RESIDENTS AND THEIR PROPERTY: *Stone* v. *Myers*, 86 Am. Dec. 104, and note 108; *Hahn* v. *Kelly*, 94 Id. 742, and note 762; *Mitchell* v. *Aten*, 1 Am. St. Rep. 231; *National Bank* v. *Peabody*, 45 Am. Rep. 635, and note; *Pickett* v. *Ferguson*, 55 Id. 545.

COURT OF EQUITY MAY ENJOIN PARTY IN ITS JURISDICTION FROM PROSECUTING SUIT IN ANOTHER STATE: *Pickett* v. *Ferguson*, 55 Am. Rep. 545; and see *Hines* v. *Hobbs*, 2 Id. 581; *Engel* v. *Scheuerman*, 2 Id. 573.

LATE REBELLION WAS WAR, AND RULES OF INTERNATIONAL LAW ARE APPLICABLE in determining the rights and relations of residents of the Confederacy and of the United States: *Billgerry* v. *Branch*, 100 Am. Dec. 679, and note 709.

MERRITT *v.* SWIMLEY.

[82 VIRGINIA, 433.]

FATHER, IF FIT AND SUITABLE PERSON, IS GENERALLY ENTITLED TO CUSTODY AND CONTROL of his infant child. But the court has a discretion upon the subject, and the welfare of the infant is the pole-star by which the discretion of the court is to be guided. The rights of the child are first to be considered, and are clearly to be protected in the enjoyment of its personal liberty, according to its own choice, if arrived at the age of discretion, and if not, to have its personal safety and interests guarded and secured by the law, acting through the agency of those who are called on to administer it.

CUSTODY AND CONTROL OF INFANT CHILD WILL NOT BE RESTORED TO HER FATHER, against her wishes, in a case where the father transferred her custody, before she was a month old, to female relatives, who tenderly nursed and reared her in happy contentment until she was twelve years of age.

PROCEEDINGS by writ of *habeas corpus* to obtain custody and control of infant child. The facts appear in the opinion.

Harrison and Byrd, for the plaintiff in error.

Holmes Conrad, for the defendants in error.

By Court, LACY, J. This is a proceeding by *habeas corpus*, on the part of the father, to obtain control and the custody of

his infant child. The respondents are the maternal aunt of the infant child and her husband. The facts are, briefly, that the father, an Ohio man, married in Frederick County, Virginia, the mother of this infant, some years ago, who bore him three children, the third being this infant, who was born on the 13th of December, 1872, and the mother died three weeks after; whereupon the infant was taken charge of by the mother's sister, and brought to Virginia, with the consent of the father, where she, the said infant, has remained ever since. In the mean time, the father has married another wife, who is childless. The two other children, a girl and a boy, have always remained with the father; and during the thirteen years of his daughter's life in Virginia, he has only seen her two or three times; and has never seen her at all except when called to Virginia on business connected with her mother's property. And he has contributed nothing to her support, except the nominal rent obtained from the grandmother for the undivided interest of the first wife in the home place. The grandmother, who had long been greatly enfeebled by age and bodily infirmity, having died, the father came to Frederick County, Virginia, and announced his purpose of carrying his daughter, Bessie, the subject of this controversy, with him out to Ohio, having in the mean time sold her mother's land, and qualified as her guardian.

Finding his daughter in delicate health, and greatly opposed to going with him, and her aunts anxious to keep her, he entered into an agreement with the respondents that if they would support the child without charge against him as her guardian, they could keep her; to which they assented. And shortly after, the said father sent them the following paper to sign, without the words in Italics:—

"WINCHESTER, VA., April 28, 1885.

"Whereas, Hugh M. Merritt, guardian of his minor child, Sarah E. V. Merritt, has left said child in our care and keeping (*until she is twenty-one years of age*), we, the undersigned, Jacob L. Swimley and Mary D. Swimley, do agree and promise to bear all expenses of her boarding, clothing, and tuition, etc., without making charge against said Hugh M. Merritt as guardian of said child."

The respondents inserted the words "until she is twenty-one years of age," which they insist was the agreement, signed it "J. L. Swimley, Mary D. Swimley," and delivered it to the counsel of the father. When this paper was received by Hugh

M. Merritt he refused to sign it, admitting that he had made the agreement without the added words, but denying that the arrangement was to continue until the child was twenty-one years of age, and forthwith instituted these proceedings in the county court of Frederick. A mass of evidence was taken on both sides, when the judge of the county court remanded the infant to the custody of the defendants, and dismissed the petition and writ. Whereupon the defendant applied for a writ of error to the circuit court of Frederick County, which was refused. Whereupon the said plaintiff applied for a writ of error to this court, which was awarded.

All the evidence is certified, and by agreement of parties entered of record, the case is submitted to this court without any burden upon the exceptor; it being agreed that all the evidence on both sides is to be considered as in a chancery case on appeal. It is proved in the case that the plaintiff in error is the father and guardian of the infant child. And it is conceded that the legal right is with him, as a general proposition, if he is a fit and suitable person; unless there are circumstances which take the case out of the general rule, the father is entitled to the custody and control of his infant child.

It was said by a learned judge (*State* v. *Smith*, 6 Greenl. 462): "That the father is generally entitled to the custody of his infant children, is a principle resulting from his obligation to maintain, protect, and educate them. These are duties thrown upon him by the law of nature as well as of society, which he is not permitted to disregard, and which he could not conveniently discharge if the object of those duties was withdrawn from his control. The right, however, is neither unlimited nor inalienable. It continues no longer than it is properly exercised. And whenever abused, or whenever the parent has become unfit, by immoral or profligate habits, to have the management and instruction of children, courts of appropriate jurisdictions have not hesitated to interfere to restrain the abuse, or to remove the subject of it from the custody of the offending parent."

As a general rule, the writ of *habeas corpus*, and all actions on it, are governed by the judicial discretion of the court, in directing which all the circumstances are to be taken into consideration. In the case of a child of tender years, the good of the child is to be regarded as the prominent consideration. There may be cases in which the court would not interfere in favor of the father to take the child from any safe custody to

deliver it to him, as when he is a vagabond, etc.: *Commonwealth* v. *Briggs*, 16 Pick. 203. But there may be cases where the reputation of the father is stainless; he may not be afflicted with the slightest mental, moral, or physical disqualification from superintending the general welfare of the infant; the mother may have separated from him without the shadow of a pretense of justification; and yet the interests of the child may imperatively demand the denial of the father's right, and its continuance with its mother: *Commonwealth* v. *Addricks*, 5 Binn. 520; *D'Hauteville Case*, decided by the court of general sessions of Philadelphia in 1840. The court, upon a proceeding of *habeas corpus*, is not bound to deliver the child to the father, but may act upon its discretion, according to the circumstances of the particular case, the principle being well established that a court is not bound by a fixed principle of right to restore a child to its father, but may at its discretion withhold it. The question occurs, Under what circumstances may that discretion be exercised? It is to be observed that in all cases the interest and welfare of the child is the great leading object to be obtained, and therefore, if it be of an age sufficiently matured to judge for itself, the court will free itself from the responsibility of determining the controversy by leaving it at liberty to go where it pleases: *Rex* v. *Smith*, 2 Story, 982; *Matter of McDowles*, 8 Johns. 328.

The decided cases establish the principle that the court has a discretion upon the subject, and that the interest of the child is the chief consideration to be looked to. In the case of *Foster* v. *Alston*, 6 How. (Miss.) 406, Mr. Justice Turner said, after reviewing the case where a guardian sought the possession of the children against the mother, "in cases like the present proceeding under the writ of *habeas corpus*, the technical legal rights of the parties do not govern," and the children were given to the mother. In a case like this, the welfare of the infant is the pole-star by which the discretion of the court is to be guided. But the legal rights of the parent or guardian are to be respected. They are founded in nature and wisdom, and are essential to the peace, order, virtue, and happiness of society. But they may have been abandoned, or released, or transferred, says a learned author: Hurd on Habeas Corpus, 528. "It frequently happens that the father of an infant, upon the death of its mother, or other event, makes an arrangement by which he gives his child to a third person, or relinquishes his custody of it until it is of age, upon consideration that the

party agrees to adopt the child and care for it as his own; and then, after the affections of both child and adopted parent become engaged, and a state of things have arisen that cannot be altered without risking the happiness of his child, will attempt to reclaim the custody of the child. In such a case, but few rules are found for the government of the court; and there are decisions, both in England and this country, to the effect that the father would not be bound by such a transaction, and would recover the custody of the child, even though the interests of the child had been promoted by the original transfer. But the better opinion is, that the father, in such a case, is not in a position to require the interference of the court in favor of a controlling legal right, on his part, against the rights, such as they are, the feelings, and the interests of other parties. See *Pool* v. *Golt*, 14 Law Rep. 269; *State* v. *Smith*, *supra*; *Matter of McDowles*, 8 Johns. 328. The parent may emancipate his child by voluntarily relinquishing his claim to the services of the child, or by permitting the child to contract marriage, etc.; and he may transfer to another his right of custody, which he may thus abandon or forfeit, when the interests of the child are not injured by the assignment. And the court could not declare that custody which is held under fair agreement with the father, and is not injurious to the child, to be an illegal restraint."

In this case the father transferred the custody of his child, before it was a month old, to female relatives, who have tenderly nursed and reared it, almost altogether without aid from the father. Whether from necessity or choice, the father has permitted this child to grow up a stranger to him, almost unknown to him by sight, perhaps entirely so. In the new home the tenderest ties of affection have been wound around her. She appears in the light of this evidence as a lonely young girl, fourteen years old next December, so intelligent and cultivated and matured beyond what is usual for her age as to be almost a woman; she has impressed the learned judge of the county court with her maturity of judgment, and she clings fondly to her adopted home, and declares that it would almost kill her to be torn from her happy surroundings and transplanted in that unlovely Ohio home among strangers. Let us contemplate for a moment this Western home, into which this father would compel the entrance of his daughter against her will. Her own mother has been long ago laid beneath the sod and forgotten. Another wife is there, child-

less herself, and using her sixteen-year-old step-daughter and step-son, younger still, as domestic servants. If the evidence is to be credited, she is a female of strong passions, and is fierce of temper, and a terror to this young girl, and bore the worst reputation before her marriage a few years ago. This home, as compared with the present surroundings of this young girl, is full of hardships and discomfort, and one to which she was not invited until she had grown to sufficient size to be useful, and her father suggested that she should be taught manual labor, a species of education up to this time neglected, he thinks, so that she could not make her living in that way. The attempts to discredit the child's present surroundings are wholly abortive. Her aunt is a reputable married woman, and her husband a man of stainless name and life. They have no children of their own, and are tenderly attached to their adopted child.

Can it be held to be to the interest of this child to tear her rudely against her own wishes from this happy home, to place her in the ruder surroundings in the Far West? Upon what principle, not in itself cruel and revolting, could it be so held? The real question in a case like this is not what are the rights of the father or the other relative to the custody of the child, or whether the right of the one be superior to that of the other, but what are the rights of the child. This cannot be considered as a question involving a right of property in the child. The true view is, that the rights of the child are first to be considered, and those rights are clearly to be protected in the enjoyment of its personal liberty, according to its own choice, if arrived at the age of discretion, and if not, to have its personal safety and interests guarded and secured by the law, acting through the agency of those who are called on to administer it.

The learned judge of the county court seems to have given great weight to the wishes and choice of the child, who appeared to him to be of sufficient age and judgment to exercise this discretion; and in that he has our entire concurrence.

The order remanding the child to the custody of the respondents was plainly right, and will be affirmed. It is not proper to pass upon any other question under these proceedings, and the order of the county court appearing to be without error, the same is affirmed.

Judgment affirmed.

RIGHT OF PARENT TO CUSTODY OF CHILD, and proceedings to vindicate it: *Brooks* v. *Logan*, 2 Am. St. Rep. 177, and extended note on the subject.

CORNWALL *v.* COMMONWEALTH.

[82 VIRGINIA, 644.]

PROVISION OF FEDERAL CONSTITUTION, ARTICLE 1, SECTION 10, that no state shall pass any law impairing the obligation of contracts, has no application to rules of evidence prescribed by the law-making power of the state to govern proceedings in the courts of the state. Hence the Virginia act of January 26, 1886, which requires that in any suit involving the genuineness of coupons purporting to have been cut from state bonds, the bond shall be produced, with proof that the coupon was actually cut therefrom, is not repugnant to said provision. Nor is the Virginia act of January 21, 1886, repugnant thereto, which provides that expert evidence shall not be received to prove the genuineness of any paper or instrument made by machinery, etc.

NO ONE CAN SUE STATE EXCEPT BY ITS OWN CONSENT; and when he avails himself of this consent, he must pursue the remedy which the law has provided.

PROCEEDING under the act of January 14, 1882, by Cornwall against the commonwealth, to verify coupons tendered by him in payment of his state taxes for 1883. On the trial, the attorney for the commonwealth demanded the production of the state bonds from which the coupons had been cut, as required by the act of January 26, 1886, providing "that in the trial of any issue involving the genuineness of a coupon appearing or purporting to have been cut from any bond authorized by law to be issued by the state of Virginia, or by any city, county, or corporation, the defendant may demand the production of the bond; and thereupon it shall be the duty of the plaintiff to produce such bond, with proof that the coupon was actually cut therefrom." The plaintiff declined to produce the bonds, on the ground that said act was repugnant to section 10 of article 1 of the constitution of the United States. The court overruled the objection, excluded the coupons as evidence, and the plaintiff excepted. The plaintiff then offered expert evidence to prove the genuineness of the coupons, but the court excluded the evidence under the act of January 21, 1886, which provides "that expert evidence shall not be received to prove the genuineness of any paper or instrument made by machinery, or in any other manner than by the actual or personal handwriting of the party to be charged, or his agent"; which act the plaintiff insisted was also repugnant to said section of the United States constitution. The plaintiff again excepted, and obtained this writ of error.

Sands and Bryan, for the plaintiff in error.

R. A. Ayers, attorney-general, and W. R. Meredith, for the commonwealth.

By Court, LACY, J. Having tendered coupons in payment of his taxes, upon the verification of the same, the plaintiff in error was required to produce the bond from which the said coupons were cut, the said coupons not being signed by the treasurer of the state, nor any other officer of the state, but being wholly printed or engraved by machinery.

This is a plain requirement of the law of this state, the bond being signed by the state treasurer, it was the best evidence of the execution of both bond and coupons, if the same had in fact been executed by any person authorized by law to bind the state. The plaintiff in error refused to produce the bond, not alleging any inability to do so, but claimed that the law of this state so requiring the bond to be produced was unconstitutional, in that it was in conflict with the tenth section, article 1, of the United States constitution, which provides that no state shall pass any law impairing the obligation of contracts. This rule of evidence is in accordance with the common-law principle of evidence in force in this state, which is in force and applicable to all the citizens of this state alike, and in no way whatever affects the obligation of any contract, proved or unproved, real or imaginary.

The cited clause of the United States constitution has no application whatever to rules of evidence prescribed by the law-making power of this state to govern proceedings in her own courts. The said provision of the United States constitution has no application to this case. This is a suit against the state of Virginia, and the plaintiff in error can only sue the state by her own consent, and when he avails of this consent he must pursue the remedy as it is provided by the law. He has no other in this or any other forum.

As to the other question, that the court refused to allow the counsel in the case to act as an expert in the premises, and prove the genuineness of the coupons he had been employed to collect, we are of opinion that the trial court was plainly right. The laws of Virginia forbid the use of expert testimony in such cases, and even this attorney at law should be an expert in such matters, he could not be received as such under our laws until the legislature of Virginia shall see fit to change the law upon this subject.

There is no error in the judgment complained of, and it must be affirmed.

Judgment affirmed.

CONSTITUTIONAL LAW. — Acts impairing obligation of contracts: See *Luter* v. *Hunter*, 98 Am. Dec. 494, and note 511; *Drehman* v. *Stifel*, 97 Id. 268; *State* v. *Barker*, 96 Id. 175, and note 179; *Scobey* v. *Gibson*, 79 Id. 490, and note 494–496; *McAffee* v. *Covington*, 51 Am. Rep. 263; *Millett* v. *People*, 57 Id. 869; *State* v. *New Orleans*, 58 Id. 168; *McLure* v. *Melton*, 58 Id. 272; *Rugh* v. *Ottenheimer*, 25 Id. 513.

STATE LEGISLATURES HAVE POWER TO REGULATE THE COMPETENCY OF WITNESSES AND PRODUCTION OF EVIDENCE in state courts, notwithstanding the fourteenth amendment of the United States constitution: *People* v. *Brady*, 6 Am. Rep. 604.

THE PRINCIPAL CASE IS CITED to the point that it is the province of the legislature of the state to prescribe rules of evidence to govern the procedure in her own courts, and the United States constitution has no application to the subject, in *Newton* v. *Commonwealth*, 82 Va. 648; and the same doctrine is affirmed in *Commonwealth* v. *Weller*, 82 Id. 721.

DARNE *v.* LLOYD.

[82 VIRGINIA, 859.]

ADVANCEMENT IS GIVING, BY ANTICIPATION, WHOLE OR PART of what it is supposed a child will be entitled to on the death of the party making it intestate. The definition embraces the idea that the party has irrevocably parted from his title in the subject advanced.

TESTATOR CAN DISPOSE OF HIS ESTATE BY WILL AS EFFECTUALLY AS HE COULD BY GIFT during his life, and, if he pleases, may turn a loan into an advancement, or, more accurately speaking, require that it may be treated as an advancement.

H. W. Thomas and C. E. Stuart, for the appellant.

R. W. Moore, for the appellee.

By Court, HINTON, J. The bill in this case was brought by John R. Darne, executor of Robert Darne, to set up and enforce against the defendant, Lester Lloyd, a bond of $950, dated April 13, 1858, which has been lost or mislaid. To this bill the defendant, who was the son-in-law of Robert Darne, demurred. The practical question raised by the demurrer is, whether or not the debt evidenced by the bond is to be treated as an advancement to Frances, the wife of said Lloyd, and the daughter of said Darne, or not.

The circuit court of Fairfax County sustained the demurrer and dismissed the bill, and it is clear that if the debt is to be regarded as an advancement, its action was right.

In the will of Robert Darne there occurs the following paragraph: "Since the execution of said deed I have advanced to Lester Lloyd the sum of $950, and for which I had a deed of

trust on a lot of land in Fairfax, which deed I have released to enable him to sell, but which amount is still due from the said Lloyd to me, and which I wish collected of him, and accounted for by him before he shall come into the distribution of my estate. My daughter Louisa, the widow of Samuel Wrenn, is also indebted to me in the sum of nine hundred dollars, advanced to her upon marriage, also the sum of fifty-five dollars, evidenced by the bond of her late husband, Samuel Wrenn, which amount I wish collected and accounted for before they shall come into the distribution of my estate. My daughter Martha is also indebted to me in the sum of three hundred dollars, which I advanced to her husband, Augustus Wrenn, and which is evidenced by his bond, which amount I wish collected and accounted for before she shall come into the distribution of my estate. When these amounts are collected, my will is that the whole of my estate be equally divided between all of my children and their descendants, including the above-named three who are indebted to me, but if they still refuse to pay the same, then they are not to have any part thereof. My will is, that my daughter Frances, the wife of Lester Lloyd, shall not be entitled to any part of my estate unless her husband, Lester Lloyd, shall account for the money he owes me as above stated."

And it is upon the construction to be given to this language that the decision of this case must turn.

It is insisted for the appellant that the debt was a loan, and not an advancement, and in support of this view numerous authorities have been cited to show that a loan, as this unquestionably was in its inception, does not fall within the legal definition of an advancement. Undoubtedly the true legal conception of an advancement is a giving, by anticipation, the whole or a part of what it is supposed a child will be entitled on the death of the party making it intestate: 1 Bouv. Law Dict. 76; *Clark* v. *Wilson*, 27 Md. 693; *Dilman* v. *Cox*, 23 Ind. 442; *Hanley* v. *Hanley*, Va. L. J., 1882. And it is equally clear that there is embraced in every definition of an advancement the idea that the parent has irrevocably parted from his title in the subject advanced: *Ison* v. *Ison*, 5 Rich. Eq. 19; *Miller's Appeal*, 13 Pa. St. 338; *McCaw* v. *Blarrett*, 2 Md. Ch. 91. If, therefore, Robert Darne had died intestate, this debt certainly could not have been treated as an advancement. But it is argued for the appellee that the word "advance" is used in the will in its technical sense, and that the effect of

the provisions of the will bearing upon this point, taken as a whole, is not to exclude the idea that the debt is to be regarded as an advancement, but simply to give Lloyd the option of paying the debt and taking a share in the distribution of the estate, or of not paying the debt and surrendering his rights, whatever they might be, as a distributee; and to this construction, in view of the confident opinion of the majority of the court, I have yielded a reluctant assent.

That the testator knew the meaning of the terms "hotchpot" and "advancement," seems clear enough from the codicil to his will, in which he bequeaths to his son, John Robert Darne, a claim against the United States, free from any claim on the part of my other heirs, or any person claiming by or through them, and free from any demand on their part to have it brought into hotchpot, and from the direction in the will that this debt should be collected of Lloyd before he should come into the distribution of his estate. When, therefore, he says "my will is, that my daughter Frances shall not be entitled to any part of my estate unless her husband, Lester Lloyd, shall account for the money he owes me, as above stated," he must be taken to mean either that Lloyd may hold the money and take none of his estate, or pay the money and share in the general distribution. Taking this as the true interpretation of the will, there is no difficulty in sustaining the opinion of the circuit court.

A testator can dispose of his estate by will just as effectually as he could by gift during his life, and, if he pleases, turn a loan into an advancement, or, to speak more accurately, require that it may be treated as an advancement; and this the testator has done in effect in this case.

Our conclusion is, that the decree of the circuit court of Fairfax must be affirmed.

Decree affirmed.

ADVANCEMENTS. — This subject is fully discussed in the following cases: *Miller's Appeal*, 80 Am. Dec. 555, and extended note 559; *Woolery* v. *Woolery*, 95 Id. 630; *Sims* v. *Sims*, 99 Id. 450; *Rickenbacker* v. *Zimmerman*, 30 Am. Rep. 37.

WIMER *v.* WIMER.

[82 VIRGINIA, 890.]

IT IS FUNDAMENTAL MAXIM OF INTERNATIONAL JURISPRUDENCE that every state or nation possesses an exclusive sovereignty and jurisdiction within its own territory; and a consequence of the maxim is, that the laws of every state affect and bind directly all property, real or personal, within its territory. Another consequence of the maxim is, that no state can by its laws, and no court can by its judgments or decrees, directly bind or affect property beyond the limits of that state.

VIRGINIA COURTS HAVE NO JURISDICTION TO DECREE PARTITION OF LANDS IN ANOTHER STATE, because the right to transfer, partition, and change real estate belongs exclusively to the state within whose territory it is situated.

SUIT for partition brought by Emanuel Wimer and others against Jacob Wimer and his wife. The lands sought to be partitioned consisted of several adjoining tracts, lying partly in Virginia and partly in West Virginia. The defendants demurred to the bill, denying the jurisdiction of the court to make partition of land situated in West Virginia, etc. The court appointed commissioners to make the partition, and they did make and reported a partition of the said lands, and the court confirmed their report. From the decree the defendants appealed.

Sheffey and Bumgardner, for the appellants.

William J. Robertson, for the appellees.

By Court, HINTON, J. The question in this case is one of importance, but of little intrinsic difficulty. It is this: Has a court in Virginia, when the defendants have appeared and answered, jurisdiction to partition lands, the major part of which lies within another state?

Now, it is a fundamental maxim of international jurisprudence that every state or nation possesses an exclusive sovereignty and jurisdiction within its own territory; and the "direct consequence of this rule is," says a learned author, "that the laws of every state affect and bind directly all property, whether real or personal, within its territory": Story's Conflict of Laws, 5, 18. Another consequence of this maxim is, that no state can by its laws, and no court, which is but a creature of the state, can by its judgments or decrees, directly bind or affect property beyond the limits of that state; and hence it is axiomatic that no writ of sequestration or execution, or any order, judgment, or decree of a foreign court,

can be directly enforced against real estate situate without the limits of the foreign state: Id., sec. 20.

"Such," says Chief Justice Parker, in *Blanchard* v. *Russell*, 13 Mass. 4, 7 Am. Dec. 106, "is the necessary result of the independence of distinct sovereignties, and it is absolutely incompatible with the equality and exclusiveness of the sovereignty of different states or nations that any one nation should be at liberty to exercise dominion over property within the territory of another state. But whilst this is true, it is undoubtedly well settled that in cases of fraud, trust, or contract, courts of equity will, whenever jurisdiction over the parties has been acquired, administer full relief, without regard to the nature or situation of the property in which the controversy had its origin, and even where the relief sought consists in a decree for the conveyance of property which lies beyond the control of the court, provided it can be reached by the exercise of its powers over the person, and the relief asked is of such a nature as the court is capable of administering": *Penn* v. *Lord Baltimore*, notes to 2 Lead. Cas. Eq. 1806 et seq.; *Farley* v. *Shippen*, Wythe, 254; 2 Story's Eq. Jur., secs. 1290 et seq.; *Dickinson* v. *Hoomes*, 8 Gratt. 353; *Barger* v. *Buckland*, 28 Id. 862; *Poindexter* v. *Burwell*, 82 Va. 507.

But even as to these cases it must be borne in mind that the decrees of the foreign court do not directly affect the land, but operate upon the person of the defendant, and compel him to execute the conveyance, and it is the convey ance which has the effect, and not the decree: *Davis* v. *Headley*, 22 N. J. Eq. 115; 4 Minor's Institutes, pt. 2, p. 1201. If, however, the relief asked cannot be administered by a decree *in personam*, without going further and acting upon the land, the court will refuse to entertain the bill. As this court said in a case which has been often quoted: "The distinction is clearly this, that where the decree is to affect the lands directly, as in the case of a suit brought at this court, to divide lands in another state, there the court would not have jurisdiction, because the process could not be effectual. . . . . But where the decree is to affect only the persons of the defendant, in order to a complete execution of it, if the plaintiff succeed, ... it is clearly held to be the settled law of the court that jurisdiction thereof may be entertained": *Guerrant* v. *Fowler*, 1 Hen. & M. 5; *Morris* v. *Remington*, 1 Parson's Eq. Cas. 387; Westlake's Private International Law, 58.

Now, tested by these principles, it is perfectly manifest that

a court of chancery in Virginia has no jurisdiction to decree a partition of lands in another state; and this, for the plain reason, before given, that the right to transfer, partition, and change real estate belongs exclusively to the state within whose territory it is situate. In order to make a partition, the court must invade by its officers the soil of another state, and divide up and allot its lands to suit the views of a foreign jurisdiction. This cannot be done: *Carteret* v. *Petty*, 2 Swanst. 323, note; *Roberdeau* v. *Rous*, 1 Atk. 543; *Poindexter* v. *Burwell*, *supra;* 2 Story's Eq. Jur., secs. 1296 et seq.; 4 Minor's Institute, 1201.

For these reasons, the decree of the circuit court of Highland County must be reversed, and the bill be dismissed.

Decree dismissed.

EQUITABLE JURISDICTION TO DEAL WITH LAND BEYOND STATE: *Piedmont Coal etc. Co.* v. *Green*, 98 Am. Dec. 799, and note 803; and see *Farmers Loan and Trust Co.* v. *Postal Telegraph Co.*, *ante*, p. 53, and cases collected in note 55.

BOCOCK *v.* ALLEGHANY COAL AND IRON COMPANY.

[82 VIRGINIA, 913.]

EVERY PERSON DEALING WITH CORPORATION IS BOUND TO TAKE NOTICE of the provisions of its charter, constitution, and by-laws, and its ways of doing business.

CORPORATION — NOTICE OF CHARTER AND BY-LAWS. — Certain persons entered into a contract to sell land to a corporation through one D., whom they took to be its authorized agent. The corporation declined to consummate the purchase, and denied that D. had any authority, under its constitution and by-laws, to bind it by his contracts. In an action to compel the specific performance of the contract on the part of the corporation, D. and others, the complainants, failed to prove D.'s authority to bind the corporation. *Held*, that the complainants were bound to ascertain whether or not D. had authority to bind the corporation, under its constitution and by-laws, failing in which, they dealt with him as its supposed agent at their own peril, and cannot be heard to complain of the corporation's refusal to assume the responsibility of his unauthorized purchase.

SUIT to compel the specific performance of a contract for the sale of land, wherein Thomas S. Bocock, executor of N. F. Bocock, deceased, O. R. Bocock and Peter A. Forbes, suing for the benefit of D. A. Parrack, were complainants, and the Alleghany Coal and Iron Company, H. C. Parsons, G. McNeill, Murillo Spaulding, and F. B. Deane were defendants.

The contract was alleged to have been entered into by the said defendant company with the complainants for the purchase of a tract of a land known as the "Pratt farm," which was supposed to contain valuable deposits of iron ores. The active parties to the transaction were the complainants named, the vendors, and F. B. Deane, the vendee. The contract was entered into June 14, 1881, by which the land was sold at the price of two thousand five hundred dollars. In evidence of the sale, a contract in writing of that date was signed by the said vendors and by "F. B. Deane, for himself and his associates." The purchasers named Murillo Spaulding as the grantee, and the vendors executed a good and sufficient deed of the land to Spaulding, and delivered it to J. D. Horsley, who was acting in the transaction as the attorney of the purchasers. During the entire negotiation, the complainants, and also Deane and Horsley, appeared to have understood that the real purchaser was the said defendant company, or if not, then H. C. Parsons, the then president, and G. McNeill, an agent, of the company, were, individually, the real purchasers. But in October, 1881, Deane and Horsley informed the complainants by letter, that "H. C. Parsons and G. McNeill, of the Alleghany Coal and Iron Company, had refused to ratify Deane's action as their agent in the purchase of the Pratt farm." On the 3d of April, 1882, the complainants instituted this suit for specific performance, setting forth in their bill the foregoing facts, and averring that the company was the real purchaser, etc.; that the company had held out to the public both Deane and Horsley as its representatives, and it thereby became responsible for their actions in making this purchase. The complainants denied all dealing with or knowledge of Spaulding in the transaction, and added, that if in the progress of the suit it should turn out that Parsons and McNeill, or either of them, were the real purchasers of the land, they then should be granted the same relief against them, or either of them. The company answered, positively denying that it had purchased this land, and that either Deane, Parsons, or McNeill was authorized in any way to purchase land for it, etc. Parsons also answered, denying all knowledge of either this land or of the contract until the latter was filed with the bill, etc. The depositions of Deane and Horsley established the fact that McNeill had either authorized or approved the purchase made by Deane, and the conveyance of the land to Spaulding, but failed to implicate either the company or Par-

sons with the transaction. Other facts appear in the opinion. The court decreed that the complainants' bill be dismissed as to the defendants the Alleghany Coal and Iron Company, Parsons, and Spaulding; and being of opinion that McNeill was the real purchaser of the land, decreed in favor of the complainants against him, that he specifically perform the said contract by paying to them the sum of two thousand five hundred dollars, with interest thereon, etc. From this decree the complainants appealed.

R. T. Hubard and George J. Hundley, for the appellants.

Johnston, Williams, and Boulware, for the appellees.

By Court, RICHARDSON, J. After a painstaking examination of the record, we are of opinion that there is no error in the decree complained of, and that the same should be affirmed. The burden of proof was on the appellants. The allegation of the bill that the defendant company was the real purchaser of the land sold by the appellants on the 14th of June, 1881, to "F. B. Deane and his associates," was positively denied by the answer of the defendant company, and the appellants wholly failed to prove the allegation.

By the constitution of the company, as we have seen, only its board of directors, or the executive committee, composed of four of its members, was authorized to make contracts to bind the company, or to select an agent or agents to make such contracts. There was no pretense of evidence in the cause to establish that said contract of sale was made either by the board or by its executive committee, or by any agent appointed by either, or that said contract, having been made by Deane without due authority, was validated by any subsequent ratification of said board or committee. The appellants, dealing, as they claimed to have done, with this corporation through Deane, were bound to take notice of its charter and by-laws. This court, per Hinton, J., in *Bockover* v. *Life Association of America*, 77 Va. 91, quoting from the supreme court of the United States in *Rolfe* v. *Rundle*, 103 U. S. 222, said: "Every person dealing with a corporation is bound to take notice of its constitution, by-laws, and ways of doing business." And to the same effect is the opinion of Fauntleroy, J., speaking for the court in *Haden* v. *Mechanics' Fire Association*, 80 Va. 691.

The appellants, then, were bound to ascertain whether or not Deane had been armed with authority to bind the defendant

company by his contract of purchase, by either its board of directors or by the executive committee of the board; and not having done so, they dealt with him as such supposed agent at their own peril, and cannot be heard now to complain of the refusal of the company to assume the responsibility of Deane's unauthorized contract.

The same is true of the allegation,—if the faltering and equivocal alternative proposition to the effect that, "if in the progress of the cause, it should turn out that McNeill and Parsons, or either of them, were the real purchasers of the said land, then the same relief is prayed for against them, or either of them, as is asked for against the Alleghany Coal and Iron Company, can properly be denominated an allegation, then such allegation is emphatically denied by the answer of the respondent Parsons. Nor did the appellants adduce sufficient evidence to overcome the effect of this answer.

Deane deposed that he had been employed by Parsons as president, at one hundred dollars a month, to devote his whole time to the development of the company's properties and to promote its interests, and that Parsons referred him to McNeill for instructions as to his duties. Surely this did not empower Deane to make a contract binding Parsons to buy this land. All else testified to by Deane is as to conversations with, and as to directions, oral and written, given him by, McNeill. These could not bind Parsons without his consent or subsequent ratification, though they do implicate McNeill, and show that he made Deane his dupe.

Horsley deposed that he went to Richmond, saw there, at the office of the Alleghany Coal and Iron Company, G. McNeill, explained to him the difficulties concerning the title to the Pratt farm, and that McNeill said he would have to see Parsons before deciding whether or not to take the farm, and requested him to call the next day; that he did call again the next day, and that McNeill said that they had determined to take the farm, and requested the deponent to go and have the sale confirmed. It was McNeill who said all this, and when Parsons was not present. It is all merely hearsay. There is nothing in the record to show that McNeill was authorized to represent Parsons in any contract for the purchase of anything. Deane confirms Horsley's testimony. But all this—and there is nothing else—is wholly insufficient to overcome the responsive denials in the answer of Parsons.

Moreover, we have here the case of a written contract for

the sale of land, entered into by the appellants (the vendors) on the one part, and on the other part by "F. B. Deane and his associates." Who the "associates" were is not disclosed by anything in the record. The contract thus entered into was assigned or transferred to Murillo Spaulding, and the decree of the circuit court of Buckingham obtained ratifying and confirming the sale, and directing the conveyance to be made to Spaulding, and the deed was made accordingly and delivered to Horsley, the company's attorney, who evidently acted under the mistaken supposition that Deane was authorized to buy the land for the company. Yet, in the face of all this, the contract solemnly confirmed to Spaulding is sought to be specifically executed against other parties who are not proved to have had any knowledge of or connection with it. Surely, in the light of the doings of the active parties to the contract, as disclosed by the record, if Deane had any associates, they were McNeill and Spaulding. We do not, however, mean to intimate, nor does the record permit it, that Deane improperly entered into collusion with McNeill and Spaulding, or with either of them, though it is manifest that he was overreached by McNeill, and did exceed his authority as employee of the company. Moreover, after carefully looking into every fact and circumstance disclosed by the record, the conclusion is inevitable that, in their reckless anxiety to effect the sale of their land, the appellants negligently failed to ascertain the identity of the parties with whom they were conducting the transaction, and the authority of Deane to act for those whom he described as "his associates." This being so, they must bear the consequences of their own default. But it is evident they made out their case against McNeill, though they failed as to the other defendants. For these reasons, we are of opinion that the decree complained of is free from error, and must be affirmed.

Decree affirmed.

PERSON DEALING WITH CORPORATION IS BOUND TO KNOW whether or not the officer or agent who represents it, and acts in its name, is authorized so to do: *Credit Co.* v. *Howe Machine Co.*, 1 Am. St. Rep. 123.

POWER OF DULY AUTHORIZED AGENT OF CORPORATION TO BIND IT, in matters of simple contract, is presumed: *Pixley* v. *Western Pac. R. R. Co.*, 91 Am. Dec. 623, and note 637; *Musser* v. *Johnson*, 97 Id. 316; the rule is not so strict as in the case of a conveyance of real property: Id.

CASES

IN THE

SUPREME COURT

OF

OREGON.

LYONS AND CHAMBERLAIN *v.* LEAHY.

[15 OREGON, 8.]

FRAUDULENT CONVEYANCE. — When conveyance is made without consideration, upon a secret trust, or upon some reservation in favor of the grantor, or to some person without interest therein, the knowledge and intent of the grantee are immaterial, and the conveyance may be set aside.

INNOCENT GRANTEE FOR VALUABLE CONSIDERATION will be protected because his equity is greater and superior to that of the general creditors under the statute.

GRANTEE'S NOTICE OF GRANTOR'S INTENT TO DEFRAUD CREDITORS must be actual, but it may be proved by direct evidence or inferred from circumstances, and established by proof of the grantee's knowledge of facts pointing to the fraudulent intent, or calculated to awaken suspicion and put a prudent man upon inquiry.

FRAUDULENT CONVEYANCE. — WHERE INSOLVENT GRANTOR conveyed his property to his partner, who conveyed to the grantor's brother without consideration, but with knowledge of the facts in each case, and the second grantee borrowed a sum of money on the property equal to about one fourth its value, which he gave to the first grantor for the purpose of paying certain creditors, the transactions were held fraudulent and void as to creditors, and the facts sufficient to show that the second grantee had notice of the intended fraud, and was not a *bona fide* purchaser within the meaning of the statute.

DEED FRAUDULENT IN FACT AS TO CREDITORS cannot stand as security for money advanced on it by grantees who have notice of the fraud.

Alex. Bernstein, for the appellant.

Woodward and Woodward, and W. M. Gregory, for the respondents.

By Court, LORD, C. J. The plaintiffs brought this suit to have certain deeds, conveying certain real property from the defendant James B. Leahy to the defendant Isaac N. Solis, and the same from the defendant Isaac N. Solis and Maria, his wife, to the defendant William J. Leahy, set aside, on the ground that the same were executed without any consideration, and for the purpose of hindering, delaying, and defrauding the plaintiffs, judgment creditors of James B. Leahy. After issue joined, the suit was referred and tried before a referree, who found on all the questions involved in favor of the plaintiffs, and reported the same to the court, all of which was subsequently confirmed by the court, and a decree entered in accordance therewith. From this decree the defendant William J. Leahy appeals to this court. The contention of the appellant resolves itself into two propositions: 1. That he is a purchaser in good faith and for a valuable consideration, and that the deed executed to him ought to be allowed to stand; but 2. That if the court, for any reason, should not sustain this proposition, that the deed to him should be allowed to stand as security for his reimbursement or indemnity.

Notice of Fraudulent Intent.—Under the provisions of statute, when a conveyance is alleged to have been made with the intent to hinder, delay, and defraud creditors, the question of fraudulent intent is to be deemed a question of fact, and not of law: Sec. 54; but the provisions referred to are not to be construed to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor: Misc. Laws, sec. 55, p. 523. It is "previous notice" of the fraudulent intent of the grantor which renders void the conveyance of the purchaser for a valuable consideration. When the conveyance is made without any consideration, or upon a secret trust, or upon some reservation for the benefit of the grantor, or to some person who has no interest whatever in the conveyance, the knowledge and intent of the grantee are not material, and the conveyance may be set aside at the instance of the creditors. But when the grantee pays a valuable consideration for the property, and without "previous notice" of the fraudulent intent of the grantor, he will be protected in the purchase. The equitable interest of the creditor in the property of the debtor the law recognizes, and

declares a transfer intended to defeat their demands as fraudulent and void; but the statute protects the rights of a purchaser for a valuable consideration, and without notice of the fraudulent intent on the part of the grantor, because, as Mr. Bump says, "the equity of such purchaser is superior to that of a general creditor, for the obvious reason that the purchaser has not, like the creditor, trusted to the personal responsibility of the debtor, but has paid the consideration upon the faith of the debtor's actual title to the specific property": Bump on Fraudulent Conveyances, 228. As to what will constitute notice seems to be of difficult definition. It is usually distinguished by the text-writers as actual or constructive notice. But the groupings under these heads have not always been satisfactory, and the adjudicated cases indicate much confusion and conflict as to what is actual notice: Wade on Notice, 2; 2 Pomeroy's Eq. Jur., sec. 596. In New York, under a statute like our own, it is held that the notice under the provisions cited is actual notice; that such notice or knowledge may be established by direct evidence, or it may be inferred from circumstances, and established by proof of the vendee's knowledge of facts pointing to the fraudulent intent or calculated to awaken suspicion; but that where it appears that he was entirely innocent and free from any guilty knowledge or suspicion, mere negligence in not inquiring into facts known to him which were calculated to put him upon inquiry is not equivalent to a want of good faith, and does not charge him with notice of the fraud. Rapallo, J., said: "Although the vendee in fact acted in good faith, and did not even suspect fraud, yet if the jury think he ought, under the circumstances, to have been suspicious and to have looked for fraud, his innocent confidence in the integrity of his vendor must be punished by the loss of his title, and he must be charged as a party to any fraud which investigation would have disclosed. . . . . We think in cases like the present, where an intent to defraud creditors is alleged, the question to be submitted to the jury should be, whether the vendee did in fact know or believe that the vendor intended to defraud his creditors, and not whether he was negligent in failing to discover the fraudulent intent," etc.: *Parker* v. *Conner*, 93 N. Y. 124; 45 Am. Rep. 178; *Stearns* v. *Gage*, 79 N. Y. 102.

These cases repudiate the doctrine of constructive notice as having no application in such case. In this court, the law as thus decided was applied and approved. In *Coolidge* v. *Heneky*,

11 Or. 327, it was held that where a valuable consideration is paid, the grantee is not affected by anything short of actual notice of the fraudulent intention of the grantor in making the conveyance, and that the doctrine of constructive notice has no application in such case. In Wisconsin, under a like statute, a different conclusion seems to have been reached, or at least, a less strict rule is held. In *Hooser* v. *Hunt*, 65 Wis. 78, the court say: "The words 'actual notice' in section 2243 of the Revised Statutes, and 'previous notice' in section 2324 of the Revised Statutes, are equivalent expressions, and the rule stated is, that notice must be held to be actual when the subsequent purchaser has actual knowledge of such facts as would put a prudent man on inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of the right or title in conflict with that which he is about to purchase. Where the subsequent purchaser has such knowledge of such facts, it becomes his duty to make inquiry, and he is guilty of bad faith if he neglects to do so, and consequently he will be charged with the actual notice he would have received if he had made the inquiry." Here the court holds that a knowledge of such facts as would put a prudent man on inquiry, if prosecuted, amounts to notice, and charges him, in contemplation of law, with knowledge of the fraudulent intent of his grantor. Other cases might be referred to, but these are sufficient to illustrate the divergence of judicial utterance under a like statute as to actual notice. As the fraudulent intent is a question of fact, and not of law, all agree that notice of such intent may be proved by direct evidence, or inferred from facts and circumstances. When the fact of the intended fraud is shown to have been communicated orally or in writing to the party to be charged, the evidence is direct of actual notice. But experience has demonstrated that this kind of proof can seldom be expected or obtained. Hence the circumstances of the transaction must be resorted to for ascertaining the truth, or uncovering the fraud. When the facts and circumstances in which the transaction originated are of so significant character as to point to the fraudulent intent of the grantor, — in effect to impart knowledge of it to the grantee, — the inference of actual notice may be quite as convincing to the mind as where the information is conveyed directly. It sometimes happens that the facts which environ a transaction quite as satisfactorily explain or disclose its true inwardness, and impart knowledge of its object, or of the intended fraud, as any

declaratory statement or other information more directly conveyed. But it is not always possible to establish a state of facts from which actual notice of the fraudulent intent may so satisfactorily or convincingly be inferred and fastened upon the grantee. The facts in evidence may be only such as are calculated to excite suspicion and put a prudent man upon inquiry; but these, admitted or uncontradicted, are sufficient to warrant the inference of actual notice, as, in that case, the facts are not susceptible of any other rational deduction. A transfer of property with knowledge of such facts, although for a valuable consideration, is inconsistent with good faith and fair dealing, and therefore, as a reasonable inference, warrants the finding of actual notice of the intended fraud.

Facts Showing Fraudulent Intent.—Now, turning to the evidence, the facts in this case show that the defendant James B. Leahy is the brother of the defendant William J. Leahy, and that the defendant Isaac N. Solis a short time before had been the business partner of James B. Leahy; that at the time the property was transferred to Solis, James B. was insolvent, and that the transfer was made without consideration; that the property would have brought at a forced or cash sale two thousand five hundred dollars; that Solis, after holding the property for a few days, and manifestly under the circumstances as detailed in the record, in trust for James B., and at his request, transferred the property to William J. without consideration. During all this time William J. knew thoroughly the financial troubles and condition of James B.,—had gone over minutely his accounts, and had counseled and advised with him concerning his affairs, and at the time he took the property from Solis at the instance of his brother, knew and understood the circumstances under which Solis took and held the property. It is explained that the property was put in the hands of Solis to raise money to pay debts; but the conduct of Solis so shortly after the transfer, his refusal to go forward, or have anything to do with it, his unwillingness to longer hold the property, and the necessity he made of putting it into other hands to retain the secret trust already created, is inconsistent with such explanation, and shows that the property was put beyond the reach of creditors to hinder and delay their demands. The same argument is made in behalf of William J., with this difference: As to him, it is claimed that although he took the property with a knowledge of such facts, that it was for the purpose of, and that he in fact did borrow

of the loan association, of which he became a member, to further that object, about six hundred dollars, giving his personal note for one thousand dollars, and mortgaging this property to secure it, which he represented to be worth three thousand dollars, and that he paid over to his brother the money thus obtained (six hundred dollars), which was applied to the payment of some particular debts. For this reason, it is claimed that he is a purchaser for a valuable consideration, and that his title ought not to be affected or impaired. Why is it, if either of the Leahys wanted to pay the creditors, that the property was not put in the market when it would have brought two thousand dollars at least, instead of taking this roundabout transaction to secure six hundred dollars? And what explanation is there of this residue, conceding the facts as stated, which is still retained to the delay of creditors? And why is it that this particular debt or debts, for which there was so much anxiety to pay, and so much trouble to secure the pittance of six hundred dollars to pay with, cannot be remembered, the amount, or names, or anything about it? The facts show that when the defendant William J. took title to the property from the defendant Solis, he dealt with and recognized the defendant James H. as the true owner of the property, notwithstanding the deed from Solis, and that he knew the character of the transaction and its purpose, and that he lent himself to its furtherance. It is admitted that mere inadequacy of consideration is not of itself sufficient to invalidate a sale, or the fact of relationship, without proof that the grantee had notice of the grantor's intent to defraud his creditors. But the facts themselves, taken collectively, are decisive of the intent to hinder and delay creditors, and that he had notice of it.

Deed not Allowed to Stand as Security.—As a last resort, however, it is asked that the deed be allowed to stand to reimburse him, or as a security for his personal liability on the note to the loan association. The result which we have reached precludes this. A fraudulent deed cannot stand as security for money paid on it. In *Levesay* v. *Beard*, 22 W. Va. 585, it is held that a deed fraudulent in fact is void *in toto*, and cannot stand as security for grantees who have notice of the fraud. In *Swinford* v. *Rogers*, 23 Cal. 233, it is held that a conveyance of a property made and received with intent to defraud creditors is void, though there may have been a full and valuable consideration paid therefor. The fraud taints

and vitiates it, and it will not be allowed to stand, even as security for advances actually made. See also *Goodwin* v. *Hammond*, 13 Cal. 170; 73 Am. Dec. 574. The case of *Crawford* v. *Beard*, 12 Or. 447, is not in point. There the court expressly found that the deed was not executed with the intent to hinder and delay creditors, and under the facts the court held that it might be allowed to stand as a security for reimbursement.

The decree must be affirmed, and it is so ordered.

VOLUNTARY CONVEYANCE IS VOID AS TO CREDITORS: *Cook* v. *Johnson*, 72 Am. Dec. 381, and note. So is a conveyance containing a secret trust for the return of the property: *Mackason's Appeal*, 82 Id. 517, and note; *Winkley* v. *Hill*, 31 Id. 215; *McCulloch* v. *Hutchinson*, 32 Id. 776.

BONA-FIDE PURCHASER FROM FRAUDULENT GRANTOR PROTECTED: *Sydnor* v. *Roberts*, 65 Am. Dec. 84; *McMahan* v. *Morrison*, 79 Id. 418; *Christian* v. *Greenwood*, 79 Id. 104, note 109; *Farlin* v. *Sook*, 46 Am. Rep. 100.

FRAUDULENT DEED IS NULLITY AS TO GRANTOR'S CREDITORS: *Schaferman* v. *O'Brien*, 92 Am. Dec. 708, note 713.

PHILBRICK *v.* O'CONNOR.

[15 OREGON, 15.]

FRAUDULENT CONVEYANCE. — WHEN, PENDING SUIT FOR DAMAGES for the malicious shooting and wounding of plaintiff by defendant, the latter conveys his property to a party of no means, and with full knowledge of all the facts and circumstances, for a grossly inadequate sum, the conveyance will be held void, and the grantee will be held to have accepted the deed with previous notice of the fraudulent intent of his grantor.

JUDGMENT BY DEFAULT, AFTER SERVICE OF SUMMONS and complaint, and failure to answer, admits the truth of every material allegation in the complaint.

DEED CONSTRUCTIVELY FRAUDULENT as to creditors may be allowed to stand as security for the purpose of reimbursing an ignorant purchaser for the money advanced.

R. and E. B. Williams, and R. C. Dement, for the appellant.

Joseph Gaston, and Tanner and Carey, for the respondents.

By Court, STRAHAN, J. The plaintiff recovered a judgment in the circuit court of Multnomah County against the defendant P. C. Smith for five thousand dollars, for the willful and malicious shooting and wounding of the plaintiff by said Smith. At the time of the commencement of said action Smith was the owner and in the possession of the property in controversy; but before judgment he conveyed the same to the appellant.

The plaintiff sued out execution on his judgment, which being returned *nulla bona*, he brings this suit to set aside the deed made by Smith to O'Connor, pending the original action, on the ground that the same was fraudulent. O'Connor filed an answer in the court below denying the material allegations of the complaint; but upon the trial the court found against him on the question of fraud, but under the peculiar and particular facts of the case, allowed the eighteen hundred dollars which he had given to Smith at the time the deed was made to be returned to him out of the first proceeds of the sale of the property, and decreed that the plaintiff be next paid the amount of his judgment from the proceeds of such sale, from which decree the defendant O'Connor has appealed to this court.

The plaintiff claims that the deed in question is void under section 51, page 523, General Laws of Oregon, which provides: "Every conveyance or assignment in writing, or otherwise, of any estate or interest in land or in goods, or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, and demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent as against the persons so hindered, delayed, or defrauded, shall be void."

And sections 54 and 55 on the same page are as follows:—

"SEC. 54. The question of fraudulent intent in all cases arising under the provisions of title 2, 3, or 4 of this chapter shall be deemed questions of fact, and not of law.

"SEC. 55. The provisions of titles 2, 3, and 4 of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

The existence of an actual fraudulent intent on the part of Smith at the time the deed in question was made, and that it was made with the intent to hinder, delay, and defraud the plaintiff, stands admitted on this record by the defendant Smith. Though personally served with the summons and complaint, he failed to file an answer, and was defaulted. This default, for the purposes of this suit, admits the truth of

every material allegation contained in the complaint as to the defendant Smith.

Notice of Fraudulent Intent. — The question, therefore, which we are called upon to consider is, whether or not the defendant O'Connor "had previous notice of the fraudulent intent," mentioned in section 55, *supra*, at the time of the execution of the deed, and as to whether he made said deed fraudulently or not. On the subject of notice in such case this court said, in *Coolidge* v. *Heneky*, 11 Or. 327: "These cases hold that in such case constructive notice is not sufficient; that actual notice is necessary to make the grantor a party to the fraud. Actual notice need not be established by direct proof. The fact of notice or knowledge may be inferred from circumstances." I cannot give my unqualified assent to this doctrine, though it certainly has very high authority to support it; still the reason for the distinction which the court seems to have drawn between actual and constructive notice to my mind is not apparent. The statute refers to notice. The character or kind of notice is not mentioned. It would seem that the word "notice," as used in the statute, then, would include whatever the law had fixed as notice. But the consideration of this question is not necessary at this time. The evidence shows that Smith had shot and seriously wounded the plaintiff in the city of Portland, where all of the parties resided at the time; that the plaintiff had brought an action against Smith for ten thousand dollars damages; that said action was then pending; that all of the facts were given extensive publicity through the various newspapers of the city; that they were talked over in the family of Mr. John O'Connor, with whom appellant boarded, and with him; that the appellant paid eighteen hundred dollars for the property, which was worth nearly three times that sum; that the appellant was virtually without money or any regular employment, and that the money which he paid to Smith was raised on the credit of Mr. John O'Connor, appellant's father, and Mr. Malarkey. Many of these circumstances are badges of fraud, and their tendency is to fix notice on the appellant of Smith's fraudulent purpose.

Deed Allowed to Stand as Security. — On the contrary, there are other facts and circumstances which tend to prove that appellant was unaccustomed to the ways and methods of business, and that he may have been used unconsciously by Smith in furtherance of Smith's fraudulent designs, without

really participating in the fraud further than must be implied by his receiving the property of Smith at a grossly inadequate price. This, itself, was a fact which ought to have awakened inquiry in his mind. He had no right to close his eyes or ears, and fail to notice those circumstances which pointed so directly to Smith's fraudulent designs. In any event, he cannot be allowed to profit by his inattenton to what any prudent business man must have noticed. Under the circumstances, the finding of the court below will not be disturbed, for the reason suggested in *Crawford* v. *Beard*, 12 Or. 447. The decree of the court below is therefore affirmed.

ASSIGNMENT OF PROPERTY TO ESCAPE LIABILITY for tort is fraudulent: *Banfield* v. *Whipple*, 87 Am. Dec. 618.

JUDGMENT BY DEFAULT ADMITS ALL MATERIAL ALLEGATIONS in the complaint: *Cook* v. *Skelton*, 71 Am. Dec. 250, note 252; *Welch* v. *Wadsworth*, 79 Id. 237, note 243.

DEED FRAUDULENT IN FACT cannot stand as security for money advanced: *Lyons* v. *Leahy*, *ante*, p. 133.

RALEY AND JOHNS *v.* UMATILLA COUNTY.

[15 OREGON, 172.]

WHERE COUNTY IS EMPOWERED BY STATUTE to purchase and hold lands lying within its own limits, it may take and hold property for a public or charitable purpose, though the deed is taken for some purpose not previously pointed out or authorized by statute.

DEED OF LAND TO COUNTY BY WHICH GRANTORS COVENANT to "warrant and defend the same against all claims whatsoever, to the use and benefit of the grantee, for the special use, and none other, of educational purposes, and upon which shall be erected a college or institution of learning free from all sectional or political influence," does not create a condition subsequent.

ESTATE UPON CONDITION IS ONE which is made to vest or to be enlarged or defeated upon the happening or not happening of some event. The condition may be express or implied, precedent or subsequent.

EXPRESS CONDITION is one declared in terms in the deed creating the estate.

IMPLIED CONDITION is one which the law implies, either from its being always understood to be annexed to certain estates, or as annexed to estates held under certain circumstances.

CONDITIONS PRECEDENT are such as must happen before the estate dependent upon them can arise or be enlarged.

CONDITIONS SUBSEQUENT are such as, when they do happen, defeat the estate.

TO CREATE CONDITION IN GRANT, appropriate words should be used; as, "on condition," "provided always," "if it shall so happen," or "so that the grantee pay, etc., within a specified," and the like.

ESTATE UPON CONDITION CANNOT BE CREATED by deed except when the terms of the grant will admit of no other reasonable construction. Therefore a recital in a deed that it is in consideration of a certain sum, and that the grantee is to do certain things, is not an estate upon condition unless it contains a clause of re-entry or forfeiture. But the same words may create a condition if a right of re-entry is reserved in favor of the grantor, in case of failure to carry out the intention expressed.

CONDITIONS SUBSEQUENT, NUMEROUS EXAMPLES GIVEN OF PHRASES USED IN DEEDS and held not to create.

IMPOSSIBLE OR ILLEGAL CONDITION is void, and the grantee takes the estate freed from the condition.

ON BREACH OF CONDITION SUBSEQUENT IN DEED, the party entitled may re-enter, or, if necessary, maintain an action to regain his estate, but equity will not entertain jurisdiction for that purpose.

GRANT FOR PUBLIC CHARITABLE USE UNCONDITIONAL as to the time when the land granted must be used, and without limit as to the time when the use must begin, cannot be forfeited for non-user, nor will the court supply conditions by implication when they were not annexed at the time the grant was made. Strahan, J., on rehearing.

GIFTS AND TRUSTS FOR PUBLIC CHARITABLE USES are favorably and liberally construed, and in such cases it is not necessary that the trustee be known or capable of taking, nor that the beneficiary or objects of the charity be certain and definite. Strahan, J., on rehearing.

Robert J. Slater, and Ramsey and Bingham, for the appellants.

Cox and Minor, and Cox, Smith, and Teal, for the respondent.

By Court, STRAHAN, J. The object of this suit is to quiet plaintiffs' title to "College Block," being block No. 12 in the town of Pendleton, Umatilla County, Oregon. The defendant demurred to the plaintiffs' amended complaint, and to each of the alleged causes of suit therein, which demurrer was sustained by the court and the suit dismissed, from which decree this appeal is taken.

The plaintiffs state the interest which they claim in said real property, and then allege the defendant's title, so that on the complaint the main facts relied upon by the respective parties are before us. It appears from the complaint that on and prior to the fifth day of December, 1868, Moses E. Goodwin was the owner in fee of the real property in controversy; and on that date he, with the plaintiff, Aura M. Raley, who was then his wife, executed and delivered to the defendant a deed, whereby, in consideration of one dollar to them in hand paid by the party of the second part, the receipt of which sum was thereby acknowledged, they granted, bargained, sold, and delivered unto the said party of the second part, said Umatilla County, the real property in controversy. The *habendum* clause of said deed is as follows: "To have and to hold the said block

of ground, with all the appurtenances thereunto belonging, unto the said party of second part forever; and said parties of first part do hereby covenant and agree with said party of the second part that they are the true owners of said premises in fee-simple, at the ensealing of these presents, and that they will warrant and defend the same against all claims whatsoever, to the use and benefit of the parties of the second part, for the special use, and none other, of educational purposes, and upon which block shall be erected a college or institution of learning, free from all sectional or political influence."

It further appears from the complaint that the plaintiffs have succeeded to all the estate or interest of said Moses E. Goodwin in said property, if any, by inheritance, three fourths thereof to said Olive L. and one fourth to said Aura M., and said Aura M. also claims dower in said property. It also appears from the complaint that before the commencement of this suit the plaintiffs entered into the possession of said property as for condition broken, and are now in the possession thereof.

1. *Power of Counties to Hold Land.* — Upon the argument, appellants' counsel insisted that Umatilla County had no power or capacity to take title to the property in controversy, or to receive said deed; and that therefore plaintiffs' title was unaffected by reason of the attempted execution and delivery of the same. This is the first question demanding our attention, for the reason that if this objection is well taken it renders the consideration of others unnecessary. By the statute of this state, relating to the corporate power and capacity of the several counties therein, it is provided "that each county shall continue to be a body politic and corporate for the following purposes, to wit: to sue and be sued; to purchase and hold for the use of the county lands lying within its own limits, and any personal estate; to make all necessary contracts; and to do all other necessary acts in relation to the property and concerns of the county": Gen. Laws, p. 535, sec. 1. Also by sections 346 and 347 counties are classed as public corporations. They are public, for the reason they are designed as agencies in the administration of civil government, and they possess and can exercise such powers as have been conferred upon them by the legislature, and none others.

By the terms of the section above quoted, a county may purchase and hold, for the use of the county, lands lying within its own limits. Counsel for the appellants claim that the

term "for the use of the county" is to be taken as a limitation upon the power of the county to take, and that therefore, unless it plainly appears that the deed is taken for some purpose or object which the legislature had previously pointed out or authorized by some act, the grant is a nullity, and confers no title. I doubt the correctness of this construction. It is harsh, and in many instances, if rigidly applied, might tend to defeat the very object of the legislature in the creation of such corporations. While the subject is not entirely free from difficulty, and it is conceded there is a conflict of authorities on the subject, still the later and better view is, that both counties and cities may take land by purchase, gift, or devise, under charters and statutes of the same legal import as our own. *Chambers* v. *City of St. Louis*, 29 Mo. 543, fully sustains such a conveyance. Under the statute of that state, all corporations had power "to hold, purchase, and convey such real estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter." It was further provided in said act that "no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given." By the charter of the city of St. Louis, the city was authorized to "purchase, receive, and hold property, real and personal, within said city, and may sell, lease, or dispose of the same for the benefit of the city; and may purchase, receive, and hold property, real and personal, beyond the limits of the city, to be used for the burial of the dead of the city; also for the erection of water-works to supply the city with water, and also for the establishment of a hospital for the reception of persons infected with contagious and other diseases; also for poor-house, work-house, or house of correction, and may sell, lease, or dispose of such property for the benefit of the city." The statute was silent on the subject of devises. Under these provisions of the charter, Bryan Mullanphy made his will, whereby he bequeathed "one equal undivided one third of all my property, real, personal, and mixed, I leave to the city of St. Louis, in the state of Missouri, in trust, to be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis on their way *bona fide* to settle in the West." Much of the real property bequeathed was beyond the limits of the city, and it was not claimed that it was intended or could be used for any of the purposes contemplated by the charter; but the title of the city under the will was sustained.

The court said: "There being a right in the city to purchase, if there is a capacity in the vendor to convey, so soon as the conveyance is made there is a complete sale; and if the corporation, in purchasing, violates or abuses the power to do so, that is no concern of the vendor or his heirs. It is a matter between the state and the city. The law is only directory in relation to a corporation taking lands. It imposes no penalty, nor does it in terms avoid the conveyance. Nowhere is a corporation in express terms prohibited from taking and holding lands. The city is duly incorporated, with authority to hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require; and if, in holding and purchasing real estate, she passes the exact line of her power, it belongs to the government of the state to exact a forfeiture of her charter; and it is not for the courts, in a collateral way, to determine the question of misuser by declaring void conveyances made in good faith. In this view of the subject we are fully sustained by the authorities": *Baird* v. *Bank of Washington*, 11 Serg. & R. 418; *Banks* v. *Poiteaux*, 3 Rand. 136; 15 Am. Dec. 706; *Leazure* v. *Hillegas*, 7 Serg. & R. 319; Angell on Corporations, sec. 152; *Silver Lake Bank* v. *North*, 4 Johns. Ch. 370.

And the same case fully sustains the power of the city to execute the trust created by the will. So in *Craig* v. *Secrist*, 54 Ind. 419, it was held that a county had the legal capacity to take a devise of the property of a testator as a permanent fund, the income of which was to be used in educating a specified class of the children of such county.

In disposing of this branch of the case, the court said: "It is further insisted by appellants' counsel that the will in this case is void, for the reason that the trustee named therein is incapable in law to accept the trust created in and by said will. It is provided by the fifth section of the act under which the devisee in this will may be said to be incorporated, that such corporations 'may prosecute and defend suits, and have all the duties, rights, and powers incident to corporations, not inconsistent with the provisions of this act': 1 R. S. 1876, p. 356. In 1 Perry on Trusts, page 30, section 42, it is said 'that at the present day, corporations of every description may take and hold estates as trustees for purposes not foreign to their own existence.' And in section 43 the same writer says: 'But if the trusts are within the general scope of the purposes of the institution or the corporation, or if they are collateral

to its general purposes, but germane to them, as if the trust relates to matters which will promote and aid the general purposes of the corporation, it may take and hold and be compelled to execute them if it accepts them. Thus towns, cities, and parishes may take and hold property in trust for the establishment of colleges, for the purpose of educating the poor, ... and for the support of schools.' The text of this writer is abundantly supported by the authorities he cites. Certainly, the purposes of the trust created by the will now being considered are not foreign to nor inconsistent with the general purposes for which the devisee named in said will was created a corporation. Rather, it seems to us, will the trust in said will, considered in its relation to the objects of said trust, promote and aid the general purposes of said corporation. In our opinion, therefore, the devisee named in said will, the county of Owen, in its corporate capacity, is capable of holding as trustee the estate devised to it in and by said will." In addition to the authorities already noticed, the following cases also sustain the authority of a public corporation to take and hold the title to real property, especially where it is in furtherance of some public trust or duty: *Executors of McDonogh* v. *Murdoch*, 15 How. 367; *Vidal* v. *Gerard's Ex'rs*, 2 Id. 127; *Bell County* v. *Alexander*, 22 Tex. 350; 73 Am. Dec. 268; *Coggeshall* v. *Pelton*, 7 Johns. Ch. 292; 11 Am. Dec. 471. But aside from these authorities, the case of *Brown* v. *Brown*, 7 Or. 285, it seems to me, fully sustains the power of a public corporation in this state to take and hold property in trust for a charitable or public purpose. By his last will, Cyrus Olney disposed of his property as follows:—

"1. I bequeath and devise all my personal property and real estate that is capable of being disposed of by will to Jackson G. Hastler and Henry S. Aiken, in trust, first, to pay all my debts; and second, to hold the rest due in perpetuity for the benefit of the town of Astoria, in the county of Clatsop, and state of Oregon."

In sustaining this bequest, the court said: "At the time the will was made, the charter of the town of Astoria gave it authority to 'purchase, hold, and receive property, real and personal, within said town for public buildings, school purposes, and town improvements.' Also, to purchase, receive, and hold property within and beyond the limits of the town, to be used for burial purposes, and for the reception of persons affected with contagious diseases, and for work-houses and houses of

correction, and for the construction of water-works to supply the town with fresh water; and to lease, sell, and dispose of the same for the benefit of the town. . . . . If the devise had been made directly to the town of Astoria, we think it would have been valid in law. It was equally so when devised to Hastler and Aiken, in trust, for the benefit of the town." And Judge Dillon gives the sanction of his name to this view of the subject. He says, 2 Dillon on Municipal Corporations, section 566: "Thus a conveyance of land to a town or other public corporation for benevolent or public purposes, as for a site for a school-house, city or town house, and the like, is based upon a sufficient consideration, and such conveyances are liberally construed in support of the object named." But if the premise contended for by the appellants were conceded, the conclusion which they seek to draw from it would not follow. The statute plainly confers upon counties the power to acquire and hold real property for certain purposes, and the appellants' contention is, that this deed conveys property to the county outside of and for other and different purposes than those specified in the statute. This is a question which these plaintiffs cannot be permitted to raise, and in which they have no interest. That could only be done at the instance of the state: 2 Dillon on Municipal Corporation, sec. 574; *Trustees of Davidson College* v. *Ex'rs of Maxwell Chambers*, 3 Jones Eq. 253; *Goundie* v. *N. W. Co.*, 7 Pa. St. 233; *Land* v. *Coffman*, 50 Mo. 243.

2. *Condition in a Grant.*—But conceding that the deed in question passed title to the land in controversy to defendant, appellants' counsel insist that it was an estate upon a condition subsequent, and that the condition not having been performed, the estate terminated upon re-entry. The determination of this question, therefore, becomes necessary. The defendant may have acquired title by the deed, or the appellants may be precluded from claiming that defendant had not legal capacity to take the land for the particular purposes specified in the deed; still, if the estate was upon a condition subsequent, and that condition has not been performed, the plaintiffs might lawfully re-enter and repossess themselves of the estate granted, and thus terminate the estate of the grantee.

An estate upon condition is "one which is made to vest, to be enlarged or defeated upon the happening or not happening of some event": Tiedeman on Real Property, secs. 271, 272; Washburn on Real Property, p. 2. "The condition which is

to affect the estate may be express or implied, and it may be precedent or subsequent. An express condition, otherwise called a condition in deed, is one declared in terms in the deed or instrument by which the estate is created. An implied, or a condition in law, is one which the law implies either from its being always understood to be annexed to certain estates, or as annexed to estates held under certain circumstances. Conditions precedent are, as the term implies, such as must happen before the estate dependent upon them can arise or be enlarged, while conditions subsequent are such as, when they do happen, defeat the estate": 2 Washburn on Real Property, p. 3, sec. 2.

To create a condition in a grant, apt and appropriate words ought to be used, such as "on condition," "provided always," "if it shall so happen," or "so that the grantee pay, etc., within a specified time," and the like. Therefore "the grant of a lot of land to set a meeting-house thereon does not imply a condition. And an estate upon condition cannot be created by deed, except where the terms of the grant will admit of no other reasonable interpretation. Therefore, reciting in a deed that it is in consideration of a certain sum, and that the grantee is to do certain things, is not an estate upon condition, not being in terms upon condition, nor containing a clause of re-entry or forfeiture. And yet these words may create a condition if a right of re-entry is reserved in favor of the grantor in case of failure to carry out the intention thus expressed": 2 Washburn on Real Property, 4, 5.

In *Taylor* v. *Binford*, 37 Ohio St. 262, a conveyance for the use of school purposes only was held not to create a condition. So in *Carter* v. *Branson*, 79 Ind. 14, the words in the *habendum* clause of the deed, "to have and hold for the use of said religious Society of Friends so long as it may be needed for meeting purposes, then said premises to fall back to the original tract," did not create a condition subsequent. And the like doctrine is very clearly announced in *First Methodist Episcopal Church of Columbia* v. *Old Columbia Public Ground Co.*, 103 Pa. St. 608. So, also, in *Packard* v. *Ames*, 16 Gray, 327. "A deed of land to a number of persons incorporated as a religious society, *habendum* to them and their heirs and assigns, and to each and every person who may hereafter become lawful owners and proprietors of a pew in a meeting-house to be built and erected thereon, and which may and shall afterwards be rebuilt thereon by the said proprietors and their successors,

to the use and behoof of the said proprietors for the said purpose, and of each and every lawful owner and proprietor of a pew or pews in the meeting-house, to be built and rebuilt on the said lot of land forever, without any clause providing for forfeiture or re-entry, is not a grant upon condition that a meeting-house shall be erected and maintained on the land conveyed." So a grant of land upon a valuable consideration, upon trust that the trustee "shall at all times permit all white religious societies of Christians, and the members of such societies, to use the land as a common burying-ground, and for no other purpose, was not upon condition subsequent": *Brown* v. *Caldwell*, 23 W. Va. 187; 48 Am. Rep. 376. Neither is a grant of land which has been used as a burying-place to a town "for a burying-place forever," in consideration of love and affection, "and divers other valuable considerations," a grant upon condition subsequent. And the like doctrine is announced in *Thornton* v. *Trammell*, 39 Ga. 202; *Risley* v. *McNiece*, 71 Ind. 434; *Ayer* v. *Emery*, 14 Allen, 67. Our conclusions on this point are strengthened by the fact that the appellants are invoking a technical rule of the common law, which rule has never been favored by the courts, but is always construed strictly: *Emerson* v. *Simpson*, 43 N. H. 475; 80 Am. Dec. 184; *Woodworth* v. *Payne*, 74 N. Y. 196; 30 Am. Rep. 398; *Page* v. *Palmer*, 48 N. H. 385; *Gadberry* v. *Sheppard*, 27 Miss. 203.

3. *Remedy for Breach of Condition.* — The counsel for appellants upon the argument claimed that the defendant was bound by the terms of the deed, in order to save the land conveyed from forfeiture, to erect thereon "a college or institution of learning free from all sectional or political influence"; and that, inasmuch as there is no law authorizing said county to apply any of the funds under its control to such a purpose, the grant was necessarily defeated. Conceding now that the words in the *habendum* clause of the deed created a condition subsequent, the conclusion which counsel drew from the fact, it seems to me, does not follow. In such case numerous authorities hold that if the condition is impossible to be performed, or illegal, it is void, and the grantee would take the estate freed from the condition: *Taylor* v. *Sutton*, 15 Ga. 103; 60 Am. Dec. 682; 2 Washburn on Real Property, p. 8, sec. 6. But it is not now necessary to decide that question. It has thus far been assumed that equity had jurisdiction in this case. This assumption has been allowed only at the re-

quest of counsel, mutually made upon the argument; but the remedy of the plaintiffs was at law upon their theory of the case. If condition subsequent be broken, the party entitled may re-enter, and if necessary, have an action to regain his estate, but equity would not entertain jurisdiction for such purposes. The other matters pleaded in the complaint, whereby it is sought to present a case of equitable cognizance, are wholly insufficient for that purpose, and do not require special notice.

Let the decree appealed from be affirmed.

On petition for rehearing: —

By Court, STRAHAN, J. Appellants' counsel have filed a petition for a rehearing, in which it is insisted that the land in controversy was granted for educational purposes, and for none other. This is conceded; the deed expresses that upon its face; but it is nowhere alleged that it is being used for any other purpose, and if it were being so used, it is probable that the heirs of the grantor have such an interest that they might restrain such unauthorized use of the thing granted. But of this they do not complain. It is the non-user for which they demand a forfeiture. The deed does not fix any time when the land granted must be so used, nor is the estate limited as to the time when its use shall begin. The grantors, when they made the deed, were chargeable with full notice of all the powers and authority of Umatilla County under the statute. Not having annexed any conditions to the grant at the time it was made, the court ought not to undertake to supply them by implication. It is also urged by counsel for appellants, with much apparent confidence, that this trust is void because those who may be its beneficiaries are uncertain or unknown. But this does not belong to that class of trusts where it is necessary they should be known. It is the use to which the property is to be applied, and not the persons benefited, which the law regards in such case. In other words, it is a trust for charitable use: 2 Perry on Trusts, sec. 700. "If in a gift for private benefit, the *cestuis que trust* are so uncertain that they cannot be identified, or cannot come into court and claim the benefit conferred upon them, the gift will fail and revert to the donor, his heirs or legal representatives. But if a gift is made for a public charitable purpose, it is immaterial that the trustee is uncertain or incapable of taking, or that the objects of the charity are uncertain or indefinite.

Indeed, it is said that vagueness is in some respects essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins: 2 Perry on Trusts, sec. 687. Trusts of this character have been generally favored and liberally construed by the courts. Such benefactors will not be defeated or overthrown on slight or trivial grounds.

The petition for a rehearing will be overruled.

COUNTIES HAVE CAPACITY TO TAKE AND HOLD LANDS FOR EDUCATIONAL PURPOSES: *Bell County* v. *Alexander*, 73 Am. Dec. 268, note 276, 277.

DEED DOES NOT CONTAIN CONDITION SUBSEQUENT WHEN: *Rawson* v. *School District No. 5*, 83 Am. Dec. 670, similar to the principal case, and see note 676; *Farnham* v. *Thompson*, 57 Am. Rep. 59, and note 63–68.

ESTATE UPON CONDITION, WORDS NECESSARY TO CREATE: *Gibert* v. *Peteler*, 97 Am. Dec. 785, and note.

CONDITIONS SUBSEQUENT IN DEEDS, and right of entry for breach thereof, discussed: Notes to *Cross* v. *Carson*, 44 Am. Dec. 743–759. See also *Thompson* v. *Thompson*, 68 Id. 638, note 649.

CHARITABLE USES — WHETHER TRUSTEE MUST BE DESIGNATED: *Bridges* v. *Pleasants*, 44 Am. Dec. 94, extended note 98–101; *Owens* v. *Missionary Society*, 67 Id. 160, note 184, 185. As to whether the beneficiary must be known, see cases cited *supra*, and *Beekman* v. *Bonsor*, 80 Id. 269, note 285, 286.

BINGHAM *v.* SALENE.

[15 OREGON, 208.]

GRANT IN PRÆSENTI OF SOLE AND EXCLUSIVE RIGHT AND PRIVILEGE TO SHOOT, take, and kill any and all wild fowl upon and in any lakes, sloughs, or waters situate upon the lands of the grantor, and of the right of ingress and egress to and from said lakes, sloughs, and waters for such purpose, is a grant of a profit *a prendre*, and not a mere revocable license; and while the privilege granted is sole and exclusive, its use is limited to the places designated, that is, the water lying upon the lands of the grantor, and must be so exercised as not to injure his crops or stock; nor does the grant authorize the indiscriminate giving of permits to numerous persons to exercise the privilege, though the grantee may sell or assign it.

RIGHTS EXERCISED BY ONE IN SOIL OF ANOTHER, accompanied with participation in the profits of the soil, are termed profits *a prendre*. They differ from easements in that the former are rights of profits, and the latter are mere rights of convenience without profit.

GRANTORS CANNOT AVOID GRANT on the ground of their illiteracy and want of understanding of its terms, when, though they cannot read and write, they speak the English language reasonably well, are persons of ordinary understanding, and not negligent of their interests, and when the grant was executed it was read and explained to them, and they fully understood its contents and terms.

AFFIRMATIVE DUTY IS ALWAYS ON ATTORNEY to show that transactions between himself and client are fair and honest and above suspicion.

INJUNCTION. — WHERE GRANTOR HAS GIVEN GRANTEE the sole and exclusive privilege to hunt and take wild fowl upon the waters on grantor's lands, but the grantee has transcended his rights by issuing permits for such privilege to numerous persons who have acted in an insolent and impudent manner toward the grantor, roamed over his land at will to the injury of his crops, left gates open, and shot and wounded his domestic animals, he will not be enjoined from resisting such unwarranted abuse of the privilege granted.

A. R. Coleman, for the appellants.

Whalley, Bronough, and Northup, for the respondents.

By Court, LORD, C. J. This is a suit in equity to enjoin the defendants from interfering in any manner with the alleged exclusive right and privileges of the plaintiffs to go upon and over certain lands of the defendants, described herein, for the purpose of shooting, killing, or taking wild fowl in the lakes, sloughs, and waters therein and thereon, and to restrain the defendants from inviting or allowing any other person or persons so to do. Briefly, the grievances complained of are that the plaintiffs, by virtue of a deed executed to them, whereby the the defendants conveyed to them, "their heirs and assigns forever, the sole and exclusive right, privilege, and easement to shoot, take, and kill any and all wild ducks and other wild fowl upon and in any and all lakes and sloughs and waters situate, lying, or upon our lands, lying in Columbia County, state of Oregon, the said lands being more particularly described as follows: . . . . and also, for the consideration above mentioned, the right of ingress and egress to and from said lakes, waters, and sloughs for the purpose of shooting and taking wild fowl as aforesaid, to have and to hold the said easement and privilege, to them, the said H. T. Bingham and E. W. Bingham, their heirs and assigns forever," which said right and privilege depended for its value on its exclusiveness; and that, in order to protect the same, the plaintiffs posted notices upon the lands of the defendants forbidding all persons from going upon the lands of the defendants for the purpose of shooting wild fowl upon the lakes and waters thereon, and that the defendants, knowing the plaintiffs' rights in the premises, tore down and destroyed said notices, and made threats of assault and personal injury to plaintiffs should they go upon said land to exercise their right and privilege, etc. And further, that the defendants have invited and permitted professional hunters to take and kill wild fowl upon said lakes

and waters, to the injury of the plaintiffs, and threaten and will continue to so do, unless restrained. After denying the matters alleged, the defendants affirmatively set up that the English language is not their native tongue; that they cannot read or write it, and understand it but indifferently; that they are ignorant of all forms of law; and that plaintiffs are practicing attorneys, and were, at the time of making the deed aforesaid, employed by the defendants as their attorneys in certain matters of business, and that plaintiffs asked them for the privilege of going upon the lands to hunt wild fowl, and that the defendants expressed themselves as willing to give them, and no one else but them, the privilege to hunt upon said lands, and that thereupon the plaintiffs prepared the above grant, but at the time of signing the same the defendants declared that they did not understand its import, and particularly the defendant Christiana, to whom then and now belong said lands, and that the plaintiffs informed her that it was nothing but the privilege to go down upon said lands and hunt, etc., and that the defendants understood that the conveyance, by its terms, granted no more than a permission to hunt upon said premises; that plaintiffs have given others permission to hunt upon the premises; and that, during the hunting season, they have come upon the lands, trampled and injured the grass and crops, and by shooting in the vicinity have frightened the stock of defendants, etc., and ask that the deed be declared null and void. The reply put in issue all the affirmative matter alleged. The suit was referred and reported by the master, which report was set aside, and new findings made by the court, on which a decree was entered, and from which both parties appeal.

By their brief and at the argument, the first inquiry of the counsel was directed to the nature and import of the exclusive privilege granted by the deed; the counsel for the defendants claiming that nothing but a license was created by it, while the counsel for the plaintiffs insisted that it was a grant of a profit *a prendre*. The distinction between a grant and a license is to be taken as understood, as the contention here is that the right and privilege granted by the terms of the deed do not constitute a grant of a license of a profit *a prendre*. Rights exercised by one man in the soil of another, accompanied with participation in the profits of the soil thereof,—as rights of pasture or digging of sand,—are termed profits *a prendre*. They are said to differ from easements, in that the former are

rights of profits, and the latter are mere rights of convenience without profit. "A right to take something out of the soil of another is a profit *a prendre*,—as the right of common, and also some minor rights,—as a right to take drifted sand, or a liberty to fish, fowl, hunt, and hawk": 1 Crabb on Real Property, 125; Phear on Water, 57. In *Ewart* v. *Graham*, 7 H. L. Cas. 234, Lord Chancellor Campbell said: "The property in animals *feræ naturæ*, while they are on the soil, belong to the owner of the soil, and he may grant a right to others to come and take them, by a grant of hunting, shooting, fowling, and so forth." That right may be granted be the owner of the fee-simple, and such a grant is a license of a profit *a prendre*." It is seen, then, that rights which are said to be *in prendre* are distinguished again into rights coupled with profits, which are called profits *a prendre*, or rights without any profits, which are called easements. But "the distinction between an interest in the soil, or a right to profit in it, and an easement, is not always palpable. The line of separation is sometimes obscure, in some points unsettled, with no established principles to determine it": Davis, J., in *Hill* v. *Lord*, 42 Me. 99. "For a profit *a prendre* in the land of another, when not granted in favor of some dominant tenement, cannot be said to be an easement, but an interest or estate in the land itself": Walworth, C., in *Post* v. *Pearsall*, 22 Wend. 425. And Mr. Washburn says: "This right of a profit *a prendre*, if enjoyed by reason of holding a certain other estate, is regarded in the light of an easement appurtenant to such estate; whereas, if it belongs to an individual, distinct from any ownership of other lands, it takes the character of an interest or estate in the land itself rather than that of a proper easement in or out of the same": Washburn on Easements, 7. But it has been expressly held that the right to enter upon the lands of another to cut grass for pasturage, for the purpose of hunting, or for fishing in an unnavigable stream, is an interest in the land, or a right to take a profit in the soil: Cro. Eliz. 180, 363; *Pickering* v. *Noyes*, 4 Barn. & C. 639; *Wickham* v. *Hawker*, 7 Mees. & W. 63; *Waters* v. *Lilley*, 4 Pick. 145; 16 Am. Dec. 333. A grant of a right to kill and take game on the lands of the grantor is a grant of an interest in the land itself, and within the statute of frauds: *Webber* v. *Lee*, L. R. 9 Q. B. D. 315. In *Wickham* v. *Hawker*, *supra*, it was held that a grant to a person, his heirs and assigns, of "free liberty, with servants or otherwise, to come in and upon lands, and there to hawk, hunt,

fish, and fowl," is a grant of a license of profit, and not of a mere personal license of pleasure, and therefore it authorized the grantee, his heirs and assigns, to hunt, fish, and fowl by his servants, in his absence, and that such a liberty is a profit *a prendre*. See also Washburn on Easements, 8–11; Washburn on Real Property, 313; Gould on Waters, secs. 24, 25, 184, 185.

Now, let us turn to the deed, and determine what the parties intended, and what interest passed. By it the defendants, for a consideration expressed, granted in words *de præsenti*, to the plaintiffs, their heirs and assigns forever, the sole and exclusive right and privilege to shoot, take, and kill any and all wild fowl upon and in any lakes, sloughs, or waters situate upon their lands, and the right of ingress and egress to and from said lakes, sloughs, and waters for such purpose. As the owners of the lands which included such lakes, sloughs, and waters thereon, the property of animals *feræ naturæ*, while on the lands or such waters, belonged to the defendants. By virtue of such ownership, the defendants had the exclusive right to shoot, take, and kill such wild fowl upon the lakes or other waters upon their lands, and they had the right to grant to the plaintiffs the sole and exclusive right to take and kill such wild fowl at the places designated in their deed. But the sole and exclusive right granted to the plaintiffs to take and kill any and all wild fowl on such lakes, sloughs, and waters is inconsistent with the right of any other persons to take or kill them, or to use and exercise such privilege at such places. It is a right exclusive of all others at such particular or specified places: *Holford* v. *Bailey*, 66 Eng. Com. L. 425–447; 55 Id. 1000–1007. If this the plaintiffs granted, — this sole and exclusive privilege to take and kill such game at such places on their land, — it divested them of all right and authority to permit or grant other persons to take and kill such wild fowl upon any lake, slough, or waters lying upon their lands. Here there is a grant of a sole and exclusive right and privilege to the plaintiffs, their heirs and assigns forever, to shoot, take, and kill such game on the lakes and waters upon the lands of the grantors, and which right, in *Webber* v. *Lee*, *supra*, was held to be a grant of an interest in land, and within the statute of frauds. This right, then, to take something out of the soil, or from the land of another, which includes shooting, hunting, and fishing, is a profit *a prendre;* and Mr. Washburn says, "is so far of the character

of an estate or interest in the land itself, that, if granted to one in gross, it is treated as an estate, and may therefore be for life or for inheritance": Washburn on Easements, 9. It is manifest, therefore, that the contention that the deed only created a license, revocable at the pleasure of the defendants, cannot be sustained.

We do, however, concur in the construction of the deed insisted upon by counsel for the defendants, that the use and enjoyment of the privilege is limited and confined strictly to the places designated. There is no authority or privilege granted to shoot, take, and kill wild duck or other wild fowl on the lands of the defendants. It is confined to the waters lying upon the lands of the defendants. The deed is specific upon this point. The right and privilege to be exercised, used, and enjoyed is, "upon and in any and all lakes, sloughs, and waters situate, lying, or upon our lands," etc. The plaintiffs have the right to shoot, take, and kill any and all wild fowl in or upon the lakes and waters situate and lying upon the lands of the defendants, but the rights and privilege are limited and confined to such designated places, and cannot be exercised elsewhere by force of the grant.

We concur, also, in the construction maintained by counsel for the defendants, that the deed does not authorize the indiscriminate giving of passes or permits to various and numerous persons, to use and enjoy the sole and exclusive right and privilege granted to them, their heirs and assigns forever. For the purpose of enjoying the privilege granted, the plaintiffs may shoot and take and kill the wild fowl upon the lakes and waters on the lands of the defendants, or they may sell and assign their right and privilege, but there is no authority to give such passes or permits, by whatever name designated, to others. In *Wickham* v. *Hawker*, *supra*, Parke, B., said: "But this is a grant by deed to persons, 'their heirs or assigns.' It is clearly intended that not merely the particular individual named, but any one to whom they or their heirs choose to assign it, should exercise the right, which seems to us to show that it is an interest or a profit *a prendre* which is intended to be granted." And it may be said, *en passant*, that much of the trouble which has caused the present suit, as indicated by the evidence, is undoubtedly due to the misconduct and abuse of the privilege by persons to whom such permits were given. Some of these persons were not only insulting to the defendants at places upon their lands where

such persons had no lawful right to be without the consent of the defendants, but they asserted defiantly the right to use, and did use, the privilege for purposes and in a manner and at places unauthorized by the terms of the grant. While "the supposed odiousness of this right," as Lord Campbell said, "cannot influence our decision," the fact, at least, admonishes us that no intendments or presumption are to be indulged in in the construction of the grant not warranted by the plain import of its terms and provisions. A grant of this description is construed strictly. The court is therefore of the opinion that such permits were unauthorized, and not within the purview of the privilege granted.

It is also contended by counsel for the defendants that the right of ingress and egress is limited to the lakes and waters. The provision on this subject is: "The right of ingress and egress to and from said lakes, waters, and sloughs, for the purpose of shooting and taking wild fowl, as aforesaid." The evident object of this provision was to give the plaintiffs ingress and egress to and from the lakes and sloughs,—the places where the privilege of killing and taking of wild fowl was to be exercised and used; and if in ingress to and egress from lake to slough was over the land, the right to pass over the land for that purpose was granted. Of course, this right can and must be used and enjoyed without detriment or injury to the crops and grass and stock of the defendants.

Thus far we have been considering solely the terms of the grant as indicated upon the face of the instrument. We come now to consider the defenses of the defendants. Substantially, they are divisible into two parts; and briefly are: 1. That the defendants, being unable to read and write, signed the deed, relying upon the representations of the plaintiffs that its provisions only created a personal license to come down to the farm of the defendants to shoot and hunt wild fowl; and 2. That at the time the deed was executed, the plaintiffs were acting as the attorneys for the defendants, and availed themselves of the confidence arising from that relation to procure their consent to grant them such privilege on the representations stated. It is sufficient to say, without going much into detail, that we do not think that either of these defenses are sustained by the evidence. It is true that the defendants cannot read or write, but both speak the English language reasonably well, and the evidence discloses that they are persons of ordinary understanding, and not negligent of their

interests. At the time the deed was executed, the defendants sought the law office of the plaintiffs for the purpose of shifting the title from the defendant husband to the defendant wife, to avoid a liability to which it might be exposed by remaining in his hands. The object of that arrangement, and the effect sought by the transfer, they evidently understood; and after the explanation made to them of the nature of the right and privilege contained in the deed executed to the plaintiffs, we cannot doubt that they understood it, — not, it may be admitted, in the technical sense, but in the sense that it was the grant of an exclusive right in perpetuity, and not a mere personal license, revocable at their pleasure. They might not have known it was a profit *a prendre;* but to accord to them ordinary sense after the explanation given, they must have understood that they were granting to the plaintiffs, their heirs and assigns forever, the exclusive right to shoot and take and kill wild fowl upon the lakes and waters on their lands. There is no difficulty in understanding the nature and duration of the privilege granted, although disagreements might arise, under the terms of the grant, as to how and where the privilege is to be used and enjoyed. This often happens with men of superior understanding and attainments in respect to writings, but it is no ground for declaring such writing invalid. We recognize it to be the duty of a party when dealing with unlettered persons who can neither read nor write, and taking from them a deed, to show, when seeking to establish or enforce some right under it, that it was read and fully explained to them before it was executed. All this was done, and the evidence to this point is explicit and conclusive. Judge Rice, who took the acknowledgment, testifies: "After the instrument was completed, which was in a few minutes, it was read over to the parties. I may have read it myself to them; but I remember distinctly that it was read by some one while I was present, and that there was a very considerable conversation between the parties and both the plaintiffs concerning the instrument and its contents. This made a very distinct impression on my mind, from the fact that there was a great deal more than I considered usual care to have the grantors fully understand the contents of the instrument." Nor do we think any declarations were made by the plaintiffs at the time, designed to deceive or mislead the defendants, or as relevant to this matter, for any other purpose than to explain the true purport of the privilege granted. All things taken together,

it is certainly clear that the plaintiffs understood what they were doing, and that the privilege granted was not a mere license, as alleged.

As to the correctness of the principle so ably maintained by the counsel for the defendants in respect to the duties and obligations of attorneys to their clients, the measure of faith and diligence required of them, and the great jealousy with which the courts watch all transactions between them, and the affirmative duty of the attorney to show that the transaction was fair and honest and above all suspicion,—in a word, that the confidence reposed has not been betrayed,—we heartily approve and indorse. The principle of a public policy, which affects with a presumption all transactions between persons standing towards each other in a confidential relation, that an undue influence has been exercised, and which devolves upon him who occupies the post of active confidence to show that presumption adequately rebutted is founded in the soundest judicial wisdom. But the fact is, so far as relates to this case, it has been previously agreed, when no such relationship existed, that the grant of this privilege should be made. It is true, it had not been put into any obligatory form, and yet the evidence indicates that when done, it was done in the pursuance of that agreement, and as necessary to be done before the title was transferred through a third party from the husband to the wife for the purposes already stated. Besides, we think that the transaction was fair and honest, and that the consideration given was the equivalent of the value of the privilege when granted, and that the plaintiffs were not guilty of any violation of the trust or confidence reposed in them. For these reasons, we do not think that the defense which seeks to set aside and declare invalid the grant is made out.

We now come to the grounds of the complaint, and the issue joined upon it, in connection with the evidence elicited, for the purpose of ascertaining whether the plaintiffs, in view of all the facts, have made such a case as will authorize the injunction prayed for. The facts alleged, and their denial, have already been stated. Without detail, it is sufficient to say there is evidence tending to prove the grievances complained of; and if there was not also evidence tending to show that the plaintiffs, in the same connection, have not been free from fault, we should be disposed to grant the relief prayed for, notwithstanding our doubts that the remedy is at law, and not in equity. It was said in *Weiss* v. *Jackson Co.*, 9 Or. 471, that the granting of an injunction is an equitable proceeding,

and that the party seeking this peculiar equitable relief should show that he has a right, under all the circumstances, to this extraordinary writ. It is admitted that the plaintiffs have issued permits to very many persons to use and enjoy the sole and exclusive privilege granted to them, their heirs and assigns. In this they transcended their rights under the terms of the grant. They claimed the right, also, to use the privilege to kill and take wild fowl at places not authorized by the grant. Some of the persons to whom the plaintiffs gave these permits not only claimed the right to hunt and shoot and roam where they pleased on the lands of the defendants, but in some instances behaved in a most impudent and insolent manner to those old people, upon whose land they had no right to be without their permission for any purpose whatever. In substance, the evidence is that they left the gates open, shot their guns off in the vicinity of the house and barn, sometimes hitting the cattle and frightening the stock; twice hitting and wounding a valuable shepherd dog, which finally had to be killed in consequence of the wounds thereof; roaming over the lands at their will; and in one instance, when ordered to leave the place, one of these persons threatening to have one of the defendants arrested; another telling her: "You have nothing to say about this place; it is none of your business; I got a permit in my pocket"; and much more of like character. Under this state of facts, is it surprising that the defendants were exasperated, and resisted? and may we not suppose that if the privilege granted had been used in conformity with its terms, the present misunderstanding might have been avoided? It may be admitted that the defendants have not been without fault; but have the plaintiffs been free from blame? We do not care to pursue the subject further.

Our opinion is, a case has not been made which would authorize the issuance of this extraordinary writ as prayed for, and that the decree must be reversed, and the bill dismissed; each party paying their own costs and disbursements.

PROFIT A PRENDRE AND EASEMENT, difference between: *Tinicum Fishing Co.* v. *Carter*, 100 Am. Dec. 597, and note. That grant of right to take fish is a profit *a prendre*, and not an easement, see same case and note; also *Cobb* v. *Davenport*, 97 Id. 718, note 722.

AS BETWEEN ATTORNEY AND CLIENT, the former must show the transaction to be fair and equitable: *Kisling* v. *Shaw*, 91 Am. Dec. 644, note 652.

MISTAKE OF GRANTOR AS TO LEGAL EFFECT OF WORDS used in a deed, if they were such as he intended to use, will not afford him relief: *Burt* v. *Wilson*, 87 Am. Dec. 142; *Ruffner* v. *McConnel*, 63 Id. 362, note 365.

WEBER *v.* ROTHCHILD.

[15 OREGON, 385.]

FRAUDULENT CONVEYANCE AS AGAINST WIFE. — Where grantor conveys property of great value for a meager consideration, under an agreement that a reconveyance will be made within a certain time for the same consideration, the deed and agreement create a secret trust in favor of the grantor, and are fraudulent and void as against his wife in her suit for divorce and alimony, when the grantee had notice at the time the deed was made of the facts constituting the ground for divorce. He cannot claim to be a *bona fide* purchaser for value.

WHERE DEED IS ATTACKED FOR FRAUD, the grantee, in order to prove himself a *bona fide* purchaser, must show that he paid a valuable consideration; that at the time of payment he had no notice of an outstanding equity, or of the fraudulent intent of the grantor, and that he acted in good faith. The same elements which were necessary to constitute a good plea in bar to such cases under the former equity practice are necessary to make a good answer under the Oregon code.

WHEN DEED IS ATTACKED FOR FRAUD, and the grantee pleads that he is a *bona fide* purchaser for value, such plea is an affirmative defense, casting the burden of proof on him, and the plaintiff need only show the fraudulent intent and purpose of the grantor.

WHEN FACT IS PECULIARLY WITHIN KNOWLEDGE OF PARTY, he must produce the necessary evidence to prove it.

WHERE TWO WRITINGS RELATE TO THE SAME SUBJECT-MATTER, bear even date, are between the same parties, and executed at the same time, they must be taken together and held to constitute but one entire transaction, in the absence of evidence to the contrary.

Emmons and Emmons, and Joseph Simon, for the appellants.

H. T. Bingham and Cornelius Taylor, for the respondent.

By Court, STRAHAN, J. The objects of this suit were: 1. To obtain a dissolution of the marriage existing between plaintiff and the defendant Emil Weber, the care and custody of the children born of said marriage, alimony, and one third of the real property of the defendant Weber; and 2. To set aside and annul, as fraudulent, a certain deed made by the defendant Emil Weber to the appellant Rothchild, of certain property in Multnomah County. The deed included the house and lot in the city of Portland, where Weber and his wife had resided for a number of years, the furniture therein, and a piece of farm land in Multnomah County. The plaintiff obtained a decree in the court below in accordance with the prayer of her complaint, and for five thousand dollars alimony, and the conveyance to Rothchild was set aside as fraudulent. From so much of the decree as annuls this deed Rothchild has appealed to this court, and the only questions presented here

for our consideration are those between the plaintiff and Rothchild.

After the evidence had all been taken in the court below, and before final decree, the court allowed the complaint to be amended so as to conform the pleading to the facts proved. This amended pleading does not affirmatively appear from the record to have been served on Rothchild, nor was it necessary, nor did he file an answer to the same. The new matter inserted in the amended pleading related entirely to the causes of divorce relied upon by the plaintiff, and did not affect the transaction between the defendants as to the property. In addition to this, Rothchild appeared and filed exceptions to the referee's report, and so far as appears his answer to the first amended complaint must have been treated as an answer to the second amended complaint, and it has been so treated in this court. It has not been suggested that there is anything in the plaintiff's second amended complaint that is not as fully met by this appellant's answer to the first amended complaint as he desired to meet it, and we cannot see that any injury will result to any party by so treating it. In addition to this, no objection appears to have been made in any form in the court below to the state of the pleadings, but it is made here for the first time. We will, therefore, for the purposes of this case, treat the answer of Rothchild as an answer to the plaintiff's second amended complaint.

The complaint alleges, substantially, that on the third day of November, 1886, the defendant Weber left his place of abode in Portland, Oregon, and absconded and secreted himself at Denver, Colorado, for the purpose of avoiding the service of a summons in this cause; that he then had in money about ten thousand dollars, which he withdrew from Ladd and Tilton's bank in the city of Portland, and that just prior to his departure from this state he fraudulently assigned and transferred the real and personal property in controversy to the defendant Rothchild, for the purpose of hindering and delaying the plaintiff in the prosecution of her suit for divorce against Weber, and defeating any decree that might be made therein; that the consideration was inadequate, and that said Rothchild did not purchase said property in good faith, but accepted the conveyance thereof with an agreement that he would reconvey the same to Weber, or such person as he should designate, when thereto requested, and that said Rothchild holds the same in trust for Weber.

The separate answer of the appellant denies the fraud charged, and then alleges that on or about the third day of November, 1886, he purchased the property in controversy in good faith from the defendant Weber, for and in consideration of the full sum of two thousand five hundred dollars, paid to said defendant Weber by this defendant. The answer then alleges that the only agreement which the defendant Rothchild made with Weber respecting said property was in writing, a copy of which is then set forth in the answer *in hæc verba*. This agreement bears even date with the deed, and in effect binds Rothchild in the penal sum of ten thousand dollars, to be void if he shall perform the conditions specified in said writing on his part to be performed. This agreement recites a money consideration of two thousand five hundred dollars, and it is then further stated in said writing, in substance, that a material part of the consideration for said conveyance "is the agreement on my part to resell and reconvey all of said real property, and every portion thereof, to said Emil Weber, upon the payment to me by him of the full sum of three thousand dollars, in gold coin of the United States, at any time within the period of one year from the date of this instrument, and to execute a good and sufficient deed of conveyance for all of the said real property conveying the same title and interest therein which I have received from said Emil Weber, upon such payment by him of said sum of three thousand dollars within said year; and whereas, I hereby agree to and with the said Emil Weber to execute said deed of conveyance, and reconvey all of said real property to him, upon the foregoing consideration." Said agreement further obligated said Rothchild to execute a deed of conveyance, upon the payment of three thousand dollars within one year, conveying the title of all of said real property, free from all encumbrances placed thereon, or suffered to be placed thereon, by myself, or any grantees or assignees, to said Weber.

We do not care to recapitulate the facts touching the relations between Weber and his wife for some time prior to the second day of November, 1886, as they are disclosed by this record. It suffices to say that they furnished ample causes for a divorce in favor of the plaintiff, and that these facts appeared to have come to the knowledge of the plaintiff not long prior to that time, and the defendant Weber also became aware about that time that his wife had acquired a knowledge of the facts upon which this suit is founded. The facts and circum-

stances leave no doubt in the mind of the court that the conveyance to Rothchild was made and designed by Weber to defeat the plaintiff in the recovery of any part of his (Weber's) property, or of alimony in her contemplated suit for a divorce. But it is argued by counsel that however fraudulent may have been his acts, Rothchild must remain unaffected, unless the evidence proves that he had knowledge of such fraudulent intent, and participated in it. This is undoubtedly true, if Rothchild's acts were in good faith.

But here two material facts appear, which, under all the circumstances, are of so cogent a character that they seem to call upon him for an explanation; in other words, that he should show that he paid a valuable consideration for the property, and that he did it without notice. The first is, that he made the contract set up in his answer, which, in the absence of any explanation, may well be regarded as creating a secret trust for Weber's own use and benefit; and the second is, that the only evidence offered on the subject tends to prove that the property in controversy was, at the time of the conveyance, of the value of from six thousand to eight thousand dollars. In addition to this, the rental value and use of the property in Portland alone, as shown by Mr. Rothchild's affidavits filed in this cause, and used upon his motion to dissolve the injunction herein, is seventy-five dollars per month. Estimating the value of this property according to the income which it is capable of producing, it ought to be worth, at the very least, from six thousand to seven thousand five hundred dollars, which, added to the value of the farm, fifteen hundred dollars, also included in the deed, and we have an aggregate value of from eight thousand to nine thousand dollars. To sell this property for two thousand five hundred dollars was too great a sacrifice. The price alleged to have been paid was so entirely inadequate as to have put a prudent man on inquiry. But without placing the decision of this case on the ground suggested, there is another question presented which deserves attention. It is the purchaser for value and without notice from a fraudulent grantor who is protected under the statute. Does the defendant's answer show him to be such purchaser? To constitute a good defense, facts must be alleged showing that the purchaser paid a valuable consideration for the property; that at the time of the payment he had no notice of the outstanding equity, or, as in this case, of the fraudulent intent of his grantor, and that he acted in

good faith. The same elements which were necessary to constitute a good plea in bar in this class of cases under the former equity practice are necessary to make a good answer under the code.

The code has only abolished forms; it has not destroyed substance. The answer must therefore "aver that the person who conveyed or mortgaged to the defendant was seised in fee or pretended to be seised, and was in possession, if the conveyance purported to be an immediate transfer of the possession at the time when he executed the purchase or mortgage deed. It must aver a conveyance, and not articles merely; for if there are articles only, and the defendant is injured, he may sue at law upon the covenants in the articles. He must aver the consideration for and the actual payment of it; a consideration secured to be paid is not sufficient": Story's Eq. Pl., sec. 805. Further: "The plea must also deny notice of the plaintiff's title or claim previous to the execution of the deed, and payment of the consideration; and the notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who could claim under that title. . . . . But the notice of fraud must also be denied generally, by way of averment in the plea; otherwise the fact of notice or of fraud will not be at issue": Story's Eq. Pl., sec. 806.

Tested by these rules, the defendant's answer seems wholly wanting in substance to present the question sought to be litigated here. It is true, there is no reply to the defendant's answer sent up in this record; but the answer being wholly lacking in substance, it is conceived that no reply was actually necessary. The failure to reply only admits material facts that are well pleaded. It is the *bona fide* purchaser for value, in good faith and without notice, who is entitled to the protection of a court of equity, as against the person sought to be defrauded by the conveyance. And this brings us to the examination of a very important question in this case, and that is this: Is the plaintiff required to prove a negative, by showing that the defendant did not pay a valuable consideration? or, having shown the fraudulent intent and purpose of the garntor, may he stop and require the grantee to prove that he paid value, in order to protect his title? Here the defendant Rothchild has alleged facts in one part of his answer tending to show that he is a *bona fide* purchaser for value without notice of this property, but he has offered no evidence what-

ever on those issues. The plea of a *bona fide* purchaser for value as here alleged is an affirmative defense interposed by the defendant, and in this connection it is not perceived that it differs from other affirmative defenses. The party having the affirmative of the issue must offer evidence to support it.

Another rule of law, equally elementary, which is frequently applied in such cases, is, that when a fact is peculiarly within the knowledge of a party, he must furnish the necessary evidence of such fact. In speaking of a conveyance found to be fraudulent on the part of the grantor, in *Tredwell* v. *Graham*, 88 N. C. 208, the supreme court of that state said: "The deed itself, though evidence conclusive as to all matters between the parties, furnishes no evidence of the truth of the matters contained in its recitals, as against strangers, for as to them it is strictly *res inter alios acta*": *Claywell* v. *McGimpsey*, 4 Dev. 89; *Griffin* v. *Tripp*, 8 Jones, 64. If voluntary, the law pronounces it fraudulent as to creditors, and he who took it must have had notice of that fact. As said by Pearson, C. J., in *Cansler* v. *Cobb*, 77 N. C. 30, "when a grantor executes a deed with intent to defraud his creditors, the grantee can only protect his title by showing that he is a purchaser for a valuable consideration and without notice of the fraudulent intent on the part of his grantor." And in *Callan* v. *Statham*, 23 How. 477, it is said: "As they aver, the payment was a transaction between themselves, and the principal part of a note was held by the vendee, which he surrendered, the evidence in respect to which is therefore exclusively within their own knowledge; it would have been more satisfactory if they had given some proof in support of the answers, especially when there were other accompanying circumstances tending to excite distrust and suspicion as to the *bona fides* of the deed."

So, also, in *Moshier* v. *Knox College*, 32 Ill. 155, the same rule was applied in a similar case. The court said: "But apart from all this, the appellees ought to retain this decree, because it is shown the indebtedness was for the purchase-money of the premises, and appellant has not shown he was a *bona fide* purchaser for a valuable consideration, paying his money at the time on the faith of the title so purchased. It was incumbent on the appellant to show, not only that he had a conveyance for this land, legal in form, but that he actually paid for the land. It is not sufficient that he may have secured the payment of the purchase-money; he must have paid it in fact before he had any notice of the appellee's equitable title. This is an essential element in the equity, which must exist in order

to support appellant's claim, which he attempts to uphold. If he has not paid the purchase-money, no wrong is done him by taking from him a legal title which cost him nothing." And the same principle is stated and applied in *Florence Sewing Machine Co.* v. *Zeigler*, 58 Ala. 221; *Zimmer* v. *Miller*, 64 Md. 296; *Venable* v. *Bank of United States*, 2 Pet. 107; *Zelnicker* v. *Brigham*, 74 Ala. 598; *Purkitt* v. *Polack*, 17 Cal. 327; *Brown* v. *Texas Cactus H. Co.*, 64 Tex. 396. And the principle is stated as elementary in Bump on Fraudulent Conveyances, page 53.

There is another objection, I think, equally fatal to the defendant's claim. The writing which the appellant set up in his answer was made by him at the same time of the execution of the deed; at least, they both relate to the same subject-matter, bear even date, and are between the same parties. We must therefore hold, especially in the absence of any evidence to the contrary, that they were executed at the same time, and taken together they constitute one entire transaction. Taken together, then, their effect was to create a trust in favor of Weber. This effect becomes distinctly manifest when the terms of the bond are considered. It is therein declared that "one of the inducements, and a material part of the consideration for said conveyance, is the agreement on my part to resell and reconvey all of said real property, and every portion thereof, to said Emil Weber, upon the payment to me by him of the full sum of three thousand dollars," etc. The meaning of this clause evidently is, that the right to repurchase was a part of the consideration for the deed, and in this way a valuable right or interest was reserved to the grantor, and this of itself would render the deed fraudulent and void: *Sims* v. *Gaines*, 64 Ala. 392.

It follows from the views expressed that there was no error committed by the court below, and its decree is affirmed.

LORD, C. J., concurred in the result.

CONVEYANCE TO DEFEAT ALIMONY fraudulent as to wife: *Green* v. *Adams*, 59 Am. Rep. 761; *Feigley* v. *Feigley*, 61 Am. Dec. 375, note 380; note to *Livermore* v. *Boutelle*, 71 Id. 711.

WHAT BONA FIDE PURCHASER MUST SHOW to sustain his claim: *Blanchard* v. *Tyler*, 86 Am. Dec. 57, and extended note 62.

PARTY CLAIMING TO BE BONA FIDE PURCHASER must prove it: *Union Canal Co.* v. *Younge*, 30 Am. Dec. 212; *Jewett* v. *Palmer*, 11 Id. 401; *Jackson* v. *McChesney*, 17 Id. 521.

WHEN TWO OR MORE WRITINGS must be held to constitute one instrument: *Dunlap* v. *Wright*, 62 Am. Dec. 506, and note 511.

BUDD *v.* MULTNOMAH STREET RAILWAY COMPANY.

[15 OREGON, 413.]

DIRECTORS OF CORPORATION HAVE POWER TO MAKE CALLS or assessments on the corporate stock without showing that they are made for a corporate purpose, or that the business of the corporation required them to be made and paid, and this whether the statute confers such power, or whether it is entirely silent on the subject.

ALL THAT IS NECESSARY TO MAKE CALL or assessment on corporate stock is some act or resolution by the directors which evinces a clear official intent to render due and payable a part or all of the unpaid subscription.

NECESSITY OF CALL OR ASSESSMENT ON CORPORATE STOCK is not open to question by the stockholders, but must be determined by the directors themselves.

CORPORATION HAS NO INHERENT POWER to forfeit or sell shares of stock owned by delinquent stockholders. That is not a common-law remedy, and can only be exercised when it is expressly conferred by some statute.

DIRECTORS OF PRIVATE CORPORATION HAVE POWER, under Hill's Oregon Code, section 3221, subdivision 6, to pass by-laws providing for the sale of delinquent stock for unpaid assessments, provided such by-laws are "not inconsistent with any existing law," but a resolution especially directed against the interests of any single delinquent stockholder is in no sense a by-law. The majority of directors cannot enforce the payment of a call or assessment, only in a particular instance, designated by resolution.

BY-LAW OF CORPORATION PROVIDING FOR SALE of delinquent stock assessments must be reasonable and general. It must affect all delinquent stockholders and all delinquent stock alike, and must not be directed against the stock or interests of a particular named stockholder.

MEASURE OF DAMAGES FOR WRONGFUL CONVERSION OF DELINQUENT STOCK is its value at the time of conversion or within a reasonable time thereafter, but an exception to this rule exists when the stockholder has suffered only a technical conversion without loss, and then only nominal damages can be recovered.

GENERAL RULE OF DAMAGES FOR WRONGFUL CONVERSION of delinquent stock is compensation; the stockholder should recover such sum as will compensate him for the injury suffered by the wrong of the corporation.

H. T. Bingham, and McDougall and Bower, for the appellant.

Killin and Starr, and Moreland and Masters, for the respondents.

By Court, STRAHAN, J. This is the second appeal in this action. The opinion of the court on the former appeal is reported in 12 Or. 271, 53 Am. Rep. 355. After the cause had been remanded, an answer was filed and issues of fact duly formed. Upon a trial, which was had before the court without a jury, the following facts were found:—

"1. That the defendant, the Multnomah Street Railway Company, was organized by the filing of articles of incorporation

in the office of the county clerk of Multnomah County, and in the office of the secretary of state, on the fourteenth day of July, 1882, and that D. E. Budd thereafter, on the twentieth day of July, 1882, in due form subscribed for one hundred shares of the capital stock of said corporation, of the nominal par value of ten thousand dollars, and said Budd had no other title to stock in said corporation than such as he acquired by said subscription.

"2. That at the meeting of the stockholders of said corporation, held on the twentieth day of July, 1882, E. J. Jeffrey, W. A. Scoggin, and D. E. Budd were duly elected directors of said corporation, and duly qualified as such directors.

"3. That at a meeting of the board of directors of said corporation, held on the fourth day of April, 1883, at the city of Portland, where the principal office and place of business of said corporation was and is fixed, the said E. J. Jeffrey, W. A. Scoggin, and D. E. Budd were present, and it was then and there voted—E. J. Jeffrey and W. A. Scoggin, yes, and D. E. Budd, no—that an assessment of one hundred per centum be levied on all the stock of the corporation, the Multnomah Street Railway Company, said assessment to be paid by the 25th of April, 1883.

"4. That on the fifteenth day of April, 1883, a written notice was served on D. E. Budd, signed by W. A. Scoggin, secretary of said corporation, and issued by order of E. J. Jeffrey, president, calling a meeting of said corporation to be held on the twenty-sixth day of April, 1883, at the hour of two o'clock P. M., at the office of the company, in the city of Portland, for the purpose of disposing of D. E. Budd's stock for delinquent assessment.

"5. That on the twenty-sixth day of April, 1883, a meeting of said directors of said corporation was held at the hour and at the place designated in the above-described notice, at which E. J. Jeffrey and W. A. Scoggin alone were present. It was voted by resolution, then and there passed, declared, and ordered, that 'whereas, D. E. Budd has failed to pay any part of the one hundred shares of the capital stock of the said corporation held by him, according to the resolutions passed by the board of directors of said corporation on the fourth day of April, 1883, that his assessment upon said one hundred shares of stock be and is declared delinquent, and that the secretary be directed to sell said one hundred shares of stock, or so much as shall be necessary to satisfy such assessment, after

giving thirty days' notice of the time and place of such sale, by publication in the Sunday Mercury, a paper published in, and of general circulation in, the city of Portland, Oregon.'

"6. That notice of the sale of said stock of D. E. Budd for delinquent assessment was published for thirty days in said Sunday Mercury, a weekly newspaper, next preceding the day of sale, which day of sale was, by said notice, designated as May 30, 1883, at the hour of two o'clock P. M.; and thereupon, on the said thirtieth day of May, 1883, at said hour, said stock of D. E. Budd, being one hundred shares, was offered for sale by W. A. Scoggin, secretary of said corporation, with the knowledge of and under the direction of E. J. Jeffrey, president, and was then and there bid off by and purchased by Amos N. King and E. A. King, who were the highest bidders for the same, for the sum of ten thousand two hundred dollars, of which amount ten thousand dollars was applied in payment of the subscription and assessment of said Budd.

"7. That the value of said stock, in case the subscription thereon had been paid, was ten thousand two hundred dollars, and subject to the assessment of one hundred per centum on said subscription; the value over and above such assessment was two hundred dollars.

"8. That after said sale said stock was transferred on the books of said corporation from the name of said D. E. Budd to the names of Amos N. King and E. A. King, and said D. E. Budd was no longer recognized by said board of directors of said corporation as a stockholder therein.

"As conclusions of law, the court finds that the plaintiff is entitled to recover from the defendants the sum of two hundred dollars, and costs and disbursements, and to have judgment for said sum."

On motion of the plaintiff, the court makes the following additional findings in this case, to wit: —

"1. The defendants, in their proceedings to sell the stock of D. E. Budd for the payment of subscription and assessment levied thereon, caused notice of such sale to be published in the Sunday Mercury newspaper, as follows: It was inserted five times. The first insertion was on the twenty-ninth day of April, 1883, and the last was on the twenty-seventh day of May, 1883, and the sale was by said notice appointed and did in fact take place on the thirtieth day of May, 1883.

"2. At the time said notice was inserted and standing in said newspaper, the said newspaper was published and circu-

lated as a weekly newspaper; was printed on Saturday of each week, but bore date of the Sunday following; was circulated to a limited extent on Saturday night of each week, but principally circulated on Sunday, running the same as its date. It did not receive nor publish the telegraph news, but had a large circulation, equal to that of any weekly newspaper published in Oregon, except the Oregonian. Its place of publication and where it was printed was in the city of Portland, Oregon."

On this appeal several questions of law have been discussed, which we will now consider.

1. *Assessment of Stock.*—It is claimed that the "call" or assessment of one hundred per centum on the stock of the defendant corporation was unlawful and unauthorized, for the reason that the resolution adopted by the directors does not show that it was made for any corporate purpose; nor does it show that any demand of the business of the company required that the subscriptions should be paid. This call appears to have been made by the board of directors of the defendant corporation, at which all were present, and there can be no question but what they had the power to make it. If the statute were entirely silent as to who should exercise the corporate power of making calls on stock, that power would devolve upon the directors: Cook on Stock and Stockholders, sec. 109; but the statute contains ample provisions covering this subject. Section 3225 of Hill's Code provides: "From the first meeting of the directors, the powers vested in the corporation are exercised by them, or by their officers or agents, under their direction, except as otherwise provided in this chapter."

It is not provided in said chapter that this particular power is vested elsewhere; therefore there can be no question but what it is one of the "powers" which is to be exercised by the directors. And such, it is believed, is the effect of the intimation of this court in *Willamette F. Co.* v. *Stannus*, 4 Or. 261; nor is there anything in the other objections taken as to the form of the call. All that is really necessary is, that there should be some act or resolution which evinces or shows a clear official intent to render due and payable a part or all the unpaid subscription: Cook on Stock and Stockholders, sec. 115. So, also, the necessity of the call is not open to question by the stockholders. The determination of that question is for the board of directors: *Chouteau Ins. Co.* v. *Floyd*, 74 Mo. 286; *Judah* v. *American L. S. Ins. Co.*, 4 Ind. 333.

2. *Sale for Non-payment of Assessment.*—Counsel for the appellant have argued that the proceedings which were taken by the defendant corporation, upon the failure of Budd to pay the call upon his shares of stock, were entirely irregular and unauthorized by law, and in this we are inclined to think they are correct. A corporation has no inherent power to forfeit or sell the shares of stock owned by delinquent stockholders. That is not a common-law remedy, and can only be exercised when it is expressly conferred by some statute: *Westcott* v. *Minnesota Mining Co.*, 23 Mich. 145; Cook on Stock and Stockholders, sec. 123. But it is claimed, on the other hand, that the statute has conferred the power exercised in this case, and counsel cite section 3221, subdivision 6, of Hill's Code. That section contains a particular enumeration of the powers conferred on all corporations organized under said act. By subdivision 6 they are empowered "to make by-laws not inconsistent with any existing law, for the sale of any portion of its stock for delinquent or unpaid assessments due thereon, which sale may be made without judgment or execution; provided, that no such sale shall be made without thirty days' notice of time and place of sale, in some newspaper in circulation in the neighborhood of such company, for the transfer of its stock, for the management of its property, and for the general regulation of its affairs." This section confers the power; but it also prescribes the manner in which it shall be exercised. It must be by a "by-law not inconsistent with any existing law." In such a case, if the corporation determines to proceed by a sale of the stock for unpaid assessments instead of by action to recover the money, it must have such a by-law as the statute prescribes, and compliance with such by-laws must be made to affirmatively appear. But it is claimed that the corporation defendant enacted a by-law for this particular case, and that the same appears in finding number 5. That resolution is in no sense a by-law. It is directed especially against the interests of a single stockholder. How many others may be delinquent does not appear; possibly none in this particular instance. But that does not affect the principle. If a majority of a board of directors of a private corporation may in any case pass such a resolution, and enforce it, they may do it in every case. The majority need not enforce the payment of calls only in particular instances, to be designated by resolution.

As was said in *People* v. *Throop*, 12 Wend. 183: "The reso-

lution entered by the directors is not entitled to the name of a by-law; it is a mere direction to the officers to exclude a director of the bank from the enjoyment of his rights. It is aimed at a single individual; not a general regulation, affecting the directors at large or the stockholders." I think that any by-law enacted under this section of the code, to be reasonable, ought to be general; that is, it ought to affect every delinquent subscriber and all delinquent stock alike, and it ought not to be directed against the stock or interests of a particular stockholder. These are essential requisites to a valid by-law.

As was said in *Commissioners* v. *Gas Comyany*, 12 Pa. St. 318: "A by-law must be reasonable, and for the common benefit; it must not be in restraint of trade, nor ought it to impose a burden without an apparent benefit": *Village of Buffalo* v. *Webster*, 10 Wend. 99; *Mayor of Hudson* v. *Thorne*, 7 Paige, 261; *Stokes* v. *City of New York*, 14 Wend. 87. So in *Goddard* v. *Merchants' Exchange*, 9 Mo. App. 290, it is said: "But by-laws must be certain, must be directed to all within the sphere of their operation, and must operate equally." So, also, in the *People ex rel. Patrick Stewart* v. *Young Men's Father Matthew T. A. B. Soc. No. 1 of Detroit*, 41 Mich. 67, it was said: "It is plain, however, that all corporation by-laws must stand on their own validity, and not on any dispensation granted to members. They cannot be subjected to any conditions which do not apply to all alike, and cannot be compelled to receive, as matter of grace, anything which is a matter of right; neither, on the other hand, should there be personal exemptions of a general nature from any valid regulations that bind the mass of corporations."

The sale of the plaintiff's stock by virtue of the resolution set out in the fifth finding was clearly illegal, and without authority.

3. *Measure of Damages.* — The measure of damages remains to be considered. The appellant contends that if the sale was illegal, he is entitled to recover in this form of action the full amount bid for the stock, without any regard whatever to the fact that he had paid nothing for it. In this class of cases, the authorities do not seem quite uniform as to the proper measure of damages in case of wrongful conversion. Perhaps the better rule is, the value of the stock at the time of the conversion, or a reasonable time thereafter: Cook on Stock and Stockholders, sec. 581. But this general rule is subject to

exceptions, one of which is, where the plaintiff has suffered only a technical conversion, without any actual pecuniary loss, only nominal damages can be recovered: Sec. 586, *supra*. And the general rule in assessing damages is compensation; that is, that the plaintiff shall recover such sum as will compensate him for the injury he has suffered by the wrong of the defendant.

In this case, these shares were encumbered by an assessment equal to their par value; that is, the purchase price of those shares for which the plaintiff was indebted to the defendant corporation. That sum must, in any event, be paid to the defendant if the shares would bring it upon the market. The findings show that they did bring that sum, and two hundred dollars more, and that of the proceeds of the sale ten thousand dollars were applied in satisfaction of plaintiff's debt to the defendant corporation. What effect these proceedings had upon the plaintiff's right to the stock in question we cannot now consider, because the question is not involved here.

All that we now decide is, that under these findings the sale of the plaintiff's stock was irregular and unauthorized, and that the court below did not err as to the measure of damages under the peculiar facts of this case. Whether the prosecution of this action to final judgment by the plaintiff is to be regarded as an election on his part to claim the money rather than the stock, and thereby ratify and affirm the irregular proceedings taken against him (*Morrison* v. *Crawford*, 7 Or. 472), or whether actual payment of the judgment is necessary to divest his title to the shares, we do not now consider or decide.

Let the judgment of the court below be affirmed.

POWER TO MAKE CALLS FOR UNPAID STOCK in corporation is vested in its directors, and no one can object to its lawful exercise, except creditors and their representatives, and the discretion of the directors extends to the time and manner of making the calls: *Germantown etc. R'y Co.* v. *Fitler*, 100 Am. Dec. 546, and note 552.

SHARE-HOLDERS MAY QUESTION ACTS of the directors of the corporation: *Simons* v. *Vulcan Oil & M. Co.*, 100 Am. Dec. 628.

POWER OF CORPORATION TO FORFEIT STOCK must be strictly pursued: *Germantown etc. R'y Co.* v. *Fitler*, 100 Am. Dec. 546; note to *Smith* v. *Mariner*, 68 Id. 88.

POWER OF CORPORATION TO MAKE BY-LAWS, and limits on: *Sayre* v. *Louisville etc. Association*, 85 Am. Dec. 613, note 618–621.

HAMLIN *v.* KASSAFER.

[15 OREGON, 456.]

OFFICE IS RIGHT TO EXERCISE PUBLIC FUNCTION OR EMPLOYMENT, and to take the fees and emoluments belonging thereto; and from its inherent nature, no less than from reasons of public policy, there cannot be two persons in the possession of the same office at the same time.

OFFICER DE FACTO IS ONE IN ACTUAL POSSESSION of the office, and in the exercise of its function and discharge of its duties. When this occurs, there can be no other incumbent of the office.

OFFICER DE JURE IS ONE WHO HAS LAWFUL RIGHT to the office, but who has either been ousted from or never actually taken possession of the office.

WHEN OFFICER DE JURE IS ALSO OFFICER DE FACTO, the lawful title and possession are united, and no other person can be officer *de facto* to that office.

OFFICER DE FACTO IS ONE WHO EXERCISES DUTIES OF OFFICE under color of appointment or election. He differs from a mere usurper who undertakes to act without color of right, and also from an officer *de jure*, who is in all respects legally appointed and qualified to exercise the office.

DISTINCTION BETWEEN OFFICER DE JURE AND DE FACTO is, that the former has the lawful right or title, without the possession of the office, while the latter has the possession and performs the duties under color of right, without being qualified in law to act; and both are distinguished from a mere usurper, who has neither title nor color of right.

MERE CLAIM TO BE OFFICER DOES NOT CONSTITUTE one an officer *de facto*. There must also be some color or claim of right to the office, or without it, a performance of official duties, with the acquiescence of the public, for such length of time as to raise a presumption of colorable right.

COLOR OF RIGHT WHICH CONSTITUTES ONE AN OFFICER DE FACTO may consist in an election or appointment, or in holding over after the expiration of one's term, or in acquiescence by the public in the acts of such officer for such length of time as to raise the presumption of colorable right by election or appointment.

LAW RECOGNIZES OFFICIAL ACTS OF OFFICER DE FACTO as lawful to a certain extent. It will not allow them to be questioned collaterally, and they are valid as to the public, and third persons who have an interest in the thing done.

ACT OF OFFICER DE JURE, WITHIN SCOPE OF HIS AUTHORITY, are valid for all purposes, but not so with an officer *de facto;* his acts are only recognized to be valid so far as they affect the public and third persons; as to these, his acts are as valid as those of an officer *de jure*.

MERE USURPER IN OFFICE is one who acts without color of title, and whose acts are utterly void.

TITLE TO OFFICE CANNOT BE DETERMINED by private suit between individuals; it must be tried by *quo warranto*.

WHERE OFFICER HOLDS OVER AFTER EXPIRATION OF HIS TERM, under claim or color of right, his official acts are those of a *de facto* officer, and are valid as to the public and third persons, and cannot be collaterally attacked. This rule applies to a judgment obtained before a *de facto* justice of the peace.

WHEN DE FACTO OFFICER is in possession of the office when adverse claim is made, he may continue to exercise the acts of the office until the title thereto is determined; and his acts, within the scope of his authority, are valid and binding upon the public and third persons, and cannot be collaterally assailed.

W. R. Andrews, for the appellant.

H. K. Hanna, for the respondents.

By Court, LORD, C. J. This action was brought by the plaintiff against the defendants to recover certain personal property alleged to have been wrongfully taken. The defendants admitted the taking, but justified in substance to this effect: That on the twenty-eighth day of September, 1887, the defendant Carlton recovered a judgment in a justice's court before one E. D. Foudroy, against the plaintiff, Hamlin, for the sum of eighty dollars and costs; that execution was issued thereon, and placed in the hands of the defendant Kassafer as constable, and that the property aforesaid was seized and taken into custody under the same, etc. The plaintiff denied the recovery of the judgment in the said justice's court, or in any court, etc. Upon issue being thus joined, the issue raised was as to the validity of said judgment.

The evidence, as disclosed by the bill of exceptions, is, in substance, that one E. D. Foudroy had been elected justice of the peace for the precinct of Jacksonville, at the general election in 1884, and had entered upon the discharge of the duties of his office; that at the general election in 1886, Foudroy was again a candidate for that office, but was defeated by one G. A. Hubbel, who received the certificate of election and duly qualified, and that he demanded of the said Foudroy the possession of said office, its docket, and books thereunto belonging, but that Foudroy refused to surrender the same, and continued to exercise and perform the functions of the said office; that thereafter, and at the time of the rendition of the said judgment by the said Foudroy, he was in possession of said office in which he had held court as a justice of the peace, and of the docket and books, and also a sign at the door notifying the public he was such officer; that the defendant Hubbel, when said judgment was rendered, was in possession of the town hall, and had acted as, and performed the duties and functions of, a justice of the peace, and that these matters were open and notorious; but the evidence indicates that these

acts were performed in his official character as a city recorder, by virtue of which he was *ex officio* justice of the peace; that the defendant Carlton, at the time of the recovery of said judgment, was a resident of Medford, and had no knowledge of any dispute as to who was justice of the peace. Upon this state of facts, the court gave several instructions which were excepted to, and refused to give another, which constitutes the main source of grievance, and from which it is evident that the plaintiff sought to have the court instruct the jury that the defendant Foudroy was a mere usurper when the judgment was rendered by him.

It is admitted, therefore, that this record presents only one question, Was Foudroy a *de facto* officer? Upon this point there would seem to be little room for controversy, for conceding, as was argued, that Hubbel, by reason of official duties performed at the town hall, was reputed to be a justice of the peace, it by no means follows that these facts operated to displace Foudroy, and induct him into the possession of the disputed office. To render the judgment void, Foudroy must have presumed to act without any just pretense or color of title. As this is the contention of counsel for the plaintiff, it may not be amiss to note, preliminarily, some distinctions as to officers, which will render the law applicable to the facts in hand more evident.

An office has been defined to be a right to exercise a public function or employment, and to take the fees and emoluments belonging to it, and Chief Justice Marshall says: "He who performs the duties of that office is an officer." From the inherent nature of an office, no less than from reasons of public policy, there cannot be two persons in the possession of an office at the same time. It becomes important, then, to observe the distinction between an officer *de jure* and an officer *de facto*. Lord Ellensborough said: "One who has the reputation of being the officer he assumed to be, and yet is not a good officer in point of law, is an officer *de facto*": *King* v. *Corporation of Bedford Level*, 6 East, 356. To constitute a person an officer *de facto*, he must be in the actual possession of the office, and in the exercise of its functions, and in the discharge of its duties. When this is the fact necessarily, there can be no other incumbent of the office. An officer *de jure* is one who has the lawful right to the office, but who has either been ousted from or never actually taken possession of the office. When the officer *de jure* is also the officer

de facto, the lawful title and possession is united; then no other person can be an officer *de facto* for that office. "Two persons cannot be officers *de facto* for the same office at the same time": *McCahon* v. *Commissioners of Leavenworth Co.*, 8 Kan. 442; *Boardman* v. *Halliday*, 10 Paige, 232; *Morgan* v. *Quackenbush*, 22 Barb. 80. "An officer *de facto*," said Storrs, J., "is one who exercises the duties of an office, under color of an appointment or election to that office. He differs, on the one hand, from a mere usurper of an office, who undertakes to act as an officer without any color of right; and on the other hand, from an officer *de jure*, who is, in all respects, legally appointed and qualified to exercise the office. It is not in all cases easy to determine what ought to be considered as constituting a colorable right to an office, so as to determine whether one is a mere usurper": *Plymouth* v. *Painter*, 17 Conn. 588; 44 Am. Dec. 574.

The distinction, then, which the law recognizes is, that an officer *de jure* is one who has the lawful right or title, without the possession of the office, while an officer *de facto* has the possession and performs the duties under the color of right, without being actually qualified in law so to act, both being distinguished from the mere usurper, who has neither lawful title nor color of right. The mere claim to be a public officer is not enough to constitute one an officer *de facto*. There must be some color to the claim of right to the office, or without such color, a performance of official duties, with the acquiescence of the public, for such a length of time as to raise a presumption of colorable right: *Brown* v. *Lunt*, 37 Me. 428; *Burke* v. *Elliott*, 4 Ired. 355; 42 Am. Dec. 142; *Conover* v. *Devlin*, 15 How. Pr. 477; *Ex parte Strang*, 21 Ohio St. 610. Said Sutherland, J.: "There must be some color of election or appointment, or an exercise of the office, and an acquiescence for a length of time, which would afford a strong presumption of at least a colorable election or appointment": *Wilcox* v. *Smith*, 5 Wend. 233; 21 Am. Dec. 213; see also *State* v. *Carroll*, 38 Conn. 449; 9 Am. Rep. 409. It may be said, then, that the color of right which constitutes one an officer *de facto* may consist in an election or appointment, or in holding over after the expiration of one's term, or acquiescence by the public in the acts of such officer for such a length of time as to raise the presumption of colorable right by election or appointment.

From considerations of public policy, the law recognizes

the official acts of such officers as lawful to a certain extent. It will not allow them to be questioned collaterally, and they are valid as to the public, and as to third persons who have an interest in the thing done: *People* v. *Stevens*, 5 Hill, 630; *Burton* v. *Patten*, 2 Jones, 124; 62 Am. Dec. 194; *People* v. *Sassovich*, 29 Cal. 480. Within the scope of his authority, the acts of an officer *de jure* are valid for all purposes. Not so with an officer *de facto;* his acts are only recognized in the law to be valid and effectual so far as they affect the public and third persons. As to these, his acts are as valid as if he were an officer *de jure*. The reason of the rule is apparent. It would be as unjust as unreasonable to require every individual doing business with such officer to investigate and determine at his peril the title of such officer. "Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to say that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and if they employ him as such, should not be subjected to the danger of having his acts collaterally called into question": Devens, J., in *Petersilea* v. *Stone*, 119 Mass. 467; 20 Am. Rep. 335. Besides, it is against the policy of the law to allow a suit between private individuals to determine the title to an office. Such judgment could only bind the parties, and would be of no effect as against the public.

Upon the facts of the case in hand, Foudroy was not an intruder, and did not usurp the office. He may have been holding over without legal authority. His term had expired, but he had not been ousted, but remained in the possession of the office, and continued to exercise the functions and discharge its duties. A mere usurper is one who acts without color of title, and whose acts are utterly void: *Hooper* v. *Goodwin*, 48 Me. 80; *Tucker* v. *Aiken*, 7 N. H. 113. Said Christian, J.: "A mere usurper is one who intrudes himself into an office which is vacant, and ousts the incumbent without any color of title whatever; and his acts are void in every respect": *McCraw* v. *Williams*, 33 Gratt. 513. Certainly, upon no view of the facts can Foudroy be regarded as an intruder or usurper within the purview of the law. From the fact that there was evidence tending to show that at the town hall Hubbel had discharged duties belonging to the office of a justice of the

peace, and was reputed by some persons to be such officer, the counsel for the plaintiff assumes as a consequence that Foudroy had been dislodged or ousted, and that these facts, without in fact being in possession of the office, its books, or docket, operated in some way, I suppose, to give him constructive possession, and to constitute him an officer, not only *de jure* but *de facto*, and to make the acts of Foudroy those of an intruder or usurper.

Laying aside the fact that the witness who testified as to such acts of Hubbel in the town hall also stated, on cross-examination, that Hubbel was at the time city recorder, by virtue of which he was *ex officio* justice of the peace, and that he did not know whether such acts were performed as an *ex officio* justice of the peace or not, it is plain law that no such consequences resulted. Foudroy being in possession of the office with the legal *indicia* of title, he was a *de facto* officer, and until the question of title was settled by a proper proceeding, he may discharge the duties of the office. "Until then," that is, ousted by *quo warranto*, says Mr. Blackwell, "he holds the office by the sufferance of the state, and the silence of the government is construed by the courts as a ratification of his acts, which is equivalent to a precedent authority. When the government acquiesces in the acts of such an officer, third persons ought not to be permitted to question them": Blackwell on Tax Titles, 117.

In *Leach* v. *Cassidy*, 23 Ind. 449, the court say: "The law has provided abundant means by which an officer *de jure* may become such *de facto* against another who wrongfully holds possession; but the public are interested; while such litigation is pending to settle the right, the function of the office shall continue to be exercised, in order that public business may be done. To this end, it is a rule of plain common sense, as well as law, that an officer *de facto* shall act until he be ousted." Again, in the same court, in *State* v. *Jones*, 19 Ind. 358, Perkins, J., said: "But if when such person attempts to take possession of the office, he is resisted by the previous incumbent, he will be compelled to try the right in some mode prescribed by law. If such elected or appointed person finds the office in fact vacant, and can take possession uncontested by the former incumbent, he may do so," etc. To the same effect in *Mayor etc. of the City of New York* v. *Conover*, 5 Abb. Pr. 179, it is said: "The public interest — the interest of all persons having business with the office in controversy — imperatively requires

that, until the question of title can be decided, there should be some one person recognized as in peaceable possession *de facto* of the office, and of course of the muniments necessary to discharge its duties.

In *State* v. *Durkee*, 12 Kan. 314, the court say: "The interest of the public requires that somebody should exercise the duties and functions of the various offices pending a litigation concerning them, and no one has a better right to do so than the various officers *de facto* who claimed to be officers *de jure*." "It would be strange doctrine," said Valentine, J., "to announce that whenever an officer steps out of the place where he usually does his business that any person who chooses to claim the office may at once step in, and become immediately an officer *de facto*. Such a short road to obtain a contested office has never yet been opened. This is not the legal way to obtain the possession of a disputed office. The only legal remedy in such case for the party out of the office to obtain the possession of the same is by a civil action in the nature of a *quo warranto*": *Braidy* v. *Theritt*, 17 Kan. 471. The evidence is that Hubbel, who was elected and qualified, demanded the office, but that Foudroy, who was in possession, refused to deliver it up, or the books, papers, and docket, but remained in the possession of the same, exercising its functions and discharging its duties, when the judgment claimed to be void was rendered.

How, then, could Hubbel be in possession of such office? If he could not acquire possession and make himself an officer *de facto* by slipping in when Foudroy was out of the place where he kept his office, according to the authority last cited, how could the acts supposed to have been performed as a justice of the peace in the town hall operate to give such possession, or constitute him an officer *de facto*? However much he may have been entitled to obtain the office, nothing but actual incumbency could make him the justice of the peace of the precinct to which he was elected. Note the analogy of the facts in *Morton* v. *Lee*, 26 Kan. 287, to the case in hand. For brevity, they are taken from the syllabus: "Where a person is duly appointed by the government of the state as a justice of the peace, and thereafter qualifies and enters upon the discharge of the duties of the office, and is placed in full possession of the books, papers, and docket pertaining to the office, and after the expiration of his term under his appointment continues to hold over, and refuses upon demand of his suc-

cessor in office to deliver up the books, papers, and docket of the office, and has full charge and control of the same, and continues to discharge the duties of the office, and is generally recognized by a large portion of the people where he holds his office as such officer, held, that he is a justice of the peace *de facto*, and his acts as justice of the peace, though not those of a lawful officer, are valid so far as they involve the interest of the public and third persons."

In *Carli* v. *Rhener*, 27 Minn. 293, Smith, who had been elected judge, qualified, and thus under a statute became *de jure* a judge in the place of his predecessor, N., whose term then expired. Thereafter, upon the same day, before S. began to perform the duties of the office, N. directed judgment in an action he had tried. *Held*, that his acts in doing so were those of an officer *de facto*, and were valid.

From these citations, it must be manifest that where one is holding over after the expiration of his term under claim or color of right, that his official acts are those of a *de facto* officer, and are valid as to the public and third persons, and cannot be collaterally assailed. And it must be considered as equally well settled that while he is in possession of such office when an adverse claim is made, he may continue to exercise the office until the question is settled. As Foudroy was never ousted, or in any manner abandoned the office, but continued in possession thereof, with all its legal *indicia*, exercising its functions and discharging its duties, he was a *de facto* officer, and as such when the judgment was rendered, it cannot be collaterally assailed.

The judgment of the court below must therefore be affirmed.

OFFICE, WHAT IS: *Shelby* v. *Alcorn*, 72 Am. Dec. 169, note 179, on the subject of office and officers; *State* v. *Stanley*, 8 Am. Rep. 488.

OFFICER DE FACTO, WHO IS: *State* v. *Carroll*, 7 Am. Rep. 409, and note 434; *State* v. *Williams*, 68 Am. Dec. 65, and note 70; *Plymouth* v. *Painter*, 44 Id. 574; *Burke* v. *Elliott*, 42 Id. 142; note to *Hildreth* v. *McIntire*, 19 Id. 63.

OFFICER DE JURE, WHO IS: *Plymouth* v. *Painter*, 44 Am. Dec. 574.

USURPER, WHO IS: *Plymouth* v. *Painter*, 44 Am. Dec. 574, and the difference between him and an officer *de facto*, note 580; note to *Smith* v. *Bondurant*, 58 Am. Rep. 442.

TO CONSTITUTE OFFICER DE FACTO there must be color of election or appointment, or an exercise of the office and acquiescence therein by the public sufficient to create a strong presumption of such colorable election or appointment: *Wilcox* v. *Smith*, 21 Am. Dec. 213; *State* v. *Carroll*, 9 Am. Rep. 409, and note; *Burke* v. *Elliott*, 42 Am. Dec. 142.

RIGHT TO OFFICE BY OFFICER DE FACTO cannot be questioned collaterally: *Hagner* v. *Hayberger*, 42 Am. Dec. 220; *Bean* v. *Thompson*, 49 Id. 154; nor can his acts: Note to *Hildreth* v. *McIntire*, 19 Id. 68.

ACTS OF DE FACTO OFFICER ARE VALID as far as they affect the public or third persons who have an interest in the thing done: *Hanover* v. *Seldenridge*, 91 Am. Dec. 532, and note 540.

ACTS OF OFFICER AFTER EXPIRATION OF TERM are valid as those of a *de facto* officer: *Smith* v. *Bondurant*, 58 Am. Rep. 438, and note; *State* v. *Williams*, 68 Am. Dec. 65, and note.

QUO WARRANTO IS PROPER REMEDY to try title to office: *People* v. *Olds*, 58 Am. Dec. 398, note 407.

VELSIAN *v.* LEWIS.

[15 OREGON, 589.]

IT IS BUYER'S OWN FAULT IF HE IS SO NEGLIGENT as not to ascertain the right of the vendor to sell, and he cannot successfully invoke his *bona fides* to protect himself from liability to the true owner, who can only be divested of his rights or title to his property by his own act, or by operation of law. Every one is bound at his peril to ascertain in whom the real title is vested, and no matter how much diligence he may exert to that end, he must abide by the consequences of any mistake.

MERE POSSESSION OF ANOTHER'S PROPERTY affords no evidence that the person having possession has power to sell, and he who purchases or intermeddles with it must see that he is protected by the authority of one who has power to sell.

POSSESSION TAKEN UNDER PURCHASE from one without title, and who has himself been guilty of conversion in disposing of the goods, is possession unauthorized and wrongful at its inception, and which the absence of evil intent in the purchaser cannot make rightful or lawful.

AT COMMON LAW, CONVERSION IS TORT committed by a person who deals with chattels not belonging to him, in a manner inconsistent with the rights of the lawful owner.

TAKING POSSESSION OF PERSONAL PROPERTY under contract of purchase is an act based on the assumption of ownership, or a right of dominion over the thing converted, where the vendor is without title, and though without evil intent, is a conversion for which trover lies without previous demand.

INTENT WITH WHICH WRONGFUL ACT IS DONE on the part of party is not an essential element of conversion, but it is enough that the true owner has been deprived of his property by the unauthorized act of some one who assumes dominion or control over it.

CONVERSION MAY CONSIST SIMPLY OF PURCHASE, even by an innocent party, of goods or chattels from one who has been guilty of conversion in disposing of them, where the buyer takes them into his possession or custody; and as trover and replevin are concurrent remedies whenever the taking is wrongful, any case in which replevin will lie without demand will support trover.

PURCHASING PERSONAL PROPERTY FROM ONE WHO HAS NO RIGHT to sell, and holding it to the buyer's use, is a conversion, for which trover or replevin will lie without previous demand or refusal.

IT IS ONLY WHERE ONE OBTAINS POSSESSION of property lawfully that demand is necessary to support replevin or trover.

IT IS DUTY OF WAREHOUSEMAN NOT TO DELIVER GOODS or grain deposited to any other person than the depositor, except on his order, or by his consent or authority.

WHERE OWNER OF PROPERTY CLOTHES ANOTHER WITH APPARENT TITLE or power of disposition, and thus induces innocent purchasers to buy, they will be protected, not upon the title or authority of the party from whom they buy, but from the act of the owner, who is estopped from disputing as against them the title or power which he allowed to appear to be vested in the party making the sale.

WHERE PARTY SELLING WHEAT IN WAREHOUSE has no *indicia* of ownership or power to sell, or the warehouseman no authority to deliver, so that neither title is conferred, nor lawful possession given or taken, the owner may assert his title and right to immediate possession as against the purchaser, however innocent of evil intent, by suit in trover, without previous demand.

W. R. Willis, for the appellants.

J. W. Hamilton, for the respondent.

By Court, LORD, C. J. This was an action in trover for the conversion of 412 bushels of wheat. The complaint is in the usual form. On the ground that it did not state facts, etc., a demurrer was interposed, which being overruled, the defendants served, viz., Merrill and Lewis, filed separate answers, denying specifically each and every material fact alleged therein. Upon issue being thus joined, a trial was had, which resulted in a verdict and judgment for the plaintiff, from which this appeal is taken. The facts out of which the controversy arises are in substance these: The plaintiff had contracted to sell his wheat to one W. F. Owens, to be delivered at the warehouse at Dillard station, and for which he was to receive his pay when the wheat was delivered. Dillard, who was the keeper of the warehouse, was to clean the wheat and to store it in his warehouse for him. Owens had made an advance of $150 to the plaintiff on his wheat, for which he had given his note, but which he paid after his wheat was taken away without any authority or order from him. The defendant Merrill, who was buying wheat for the defendants Allen and Lewis, as their agent, went to the plaintiff to buy his wheat while he was thrashing, but the plaintiff declined to sell, telling the defendant Merrill of his sale to Owens, and the advance he had received, and at the same time declined to receive when the plaintiff offered to pay the amount Owens had advanced. The plaintiff had delivered at the warehouse 412 bushels of wheat in two-bushel sacks, marked No. 30,

when Owens died. Just prior to this, the defendant Merrill had bought of Owens a lot of wheat, and got an order to Dillard for it. A part of it included the wheat in controversy, as appears by the order of Owens to Dillard, and which directs the delivery of the wheat to Merrill, and to be shipped to his order. Dillard accepted the order, and by the directions of Merrill shipped the wheat to Allen and Lewis at Portland. The plaintiff never saw the order from Owens to deliver the wheat to Merrill, nor never asked Merrill, or Allen and Lewis for the wheat. The plaintiff testifies that "Dillard told me his warehouse was getting full, and asked if he could clean and ship that much [412 bushels] of my wheat. I told Dillard he could clean it, but did not tell him to ship it; I did not know who got the wheat, except what others told me. I gave no order to take it." Dillard testifies that "I told him [plaintiff] that I had an order from Owens to ship the wheat on Merrill's order. I told him that my warehouse was getting full of wheat, and asked him if I could clean and ship this lot of wheat. He said I could clean it, and I understood him that I could ship it. He did not object to my shipping it on Owens's order. I cleaned it and put it out of the warehouse into the railroad cars to be delivered to Allen and Lewis at Portland." The evidence also shows that the reason the plaintiff made his contract that the money was to be paid when the wheat was delivered was, in his own words: "I had trouble last year about getting my money, and I made this arrangement so that I could get my money when the wheat was sold." Upon this state of facts, as far as relates to the wheat of the plaintiff, it is clear that Owens sold it to the defendant Merrill as the agent of the defendants Allen and Lewis, without the consent of the plaintiff, and when he had no title to it, and could give no lawful or rightful order for its delivery to any one, and that Dillard exceeded his authority when he accepted such order, and by direction of the defendant Merrill put the wheat aboard of the cars and delivered it to the defendants without the consent of the plaintiff. Nor is this disputed, or that these acts do not constitute a wrongful taking or conversion as against them. But the contention of counsel for the defendants is, that where the purchase is made in good faith, although from one without title, and the possession is taken from one rightfully in possession, that the action of trover for a wrongful conversion is not maintainable without previous demand before suit, unless some subsequent acts

of the purchaser make him guilty of a conversion. In a word, he seeks to place the transaction on the same footing as a sale by a bailee or warehouseman, and argues that as the buyer acts in good faith, his possession is lawful, particularly where he takes possession from a warehouseman who has the lawful possession of the goods. Hence he insists there is no wrongful taking or conversion without some other subsequent act of dominion or control inconsistent with the rights of the true owner. It is not perceived, however, how this view can aid the contention of the counsel for the defendants.

At first blush, it may seem strange that one who takes possession of goods or chattels under a contract of purchase, from one who had no right to sell, should be treated as a wrongdoer; but the explanation of the principle lies in the common-law maxim *caveat emptor*, which applies to the transfer of personal property. It is the buyer's own fault, if he is so negligent as not to ascertain the right of the vendor to sell, and he cannot successfully invoke his *bona fides* to protect himself from liability to the true owner, who can only be divested of his rights or title to his property by his own act, or by the operation of law. Every person is bound at his peril to ascertain in whom the real title to property is vested, and however much diligence he may exert to that end, he must abide by the consequences of any mistake: *Gilmore* v. *Newton*, 9 Allen, 171; 85 Am. Dec. 749; *Spraights* v. *Hawley*, 39 N. Y. 141; 100 Am. Dec. 452; *Hotchkins* v. *Hunt*, 49 Me. 213. Nothing can be plainer than that "no one can sell a right when he himself has none to sell, and that every such wrongful sale, by whomsoever made, whether by thief or bailee, acts in derogation of the rights of the owner and in hostility to his authority, and consequently can neither acquire themselves nor confer on the purchaser any right or title of such owner. Mere possession of another man's property affords no evidence that the person having such possession has power to sell it, and he who purchases or intermeddles with it must see to it that he is protected by the authority of one who has power to sell": *Dixon* v. *Caldwell*, 15 Ohio St. 412; 86 Am. Dec. 487; *Spraights* v. *Hawley*, *supra*; *Cooper* v. *Newton*, 45 N. H. 339. A possession taken under a purchase from one without title, and who has himself been guilty of a conversion in disposing of the goods or chattels, is a possession unauthorized and wrongful at its inception, and which the absence of evil intent in the purchaser cannot make rightful or lawful. Such a possession is

based on the assumption of a right of property, or a right of dominion over it, derived from the contract of sale; and what is this, in the legal sense, but a wrongful intermeddling or asportation or detention of the property of another? At common law, a conversion is that tort which is committed by a person who deals with chattels not belonging to him, in a manner which is inconsistent with the rights of the lawful owner: Rapalje and Lawrence's Dictionary. "Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion": Cooley on Torts, 428; *Ramsby* v. *Beezley*, 11 Or. 51. It consists in the exercise of dominion and control over property inconsistent with and in denial of the rights of the true owner, or the party having the right of possession. Said Shepley, J.: "The exercise of such a claim of right, or dominion over the property as assumes that he is entitled to the possession, or to deprive the party of it, is a conversion": *Fernald* v. *Chase*, 37 Me. 290.

The defendants, by taking possession under their purchase, assumed an ownership, and exercised a dominion over the property inconsistent with the rights of the plaintiff as the true owner. "The very act," said Lord Ellenborough, "of taking goods from one who has no right to dispose of them is a conversion," and held the action of trover maintainable: *Hurst* v. *Gwennap*, 2 Stark. 306. "And again," said the same learned judge, "the very assuming to one's self the property and right of disposing of another man's goods is a conversion; and certainly a man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it; for what is that but assisting the other in carrying his wrongful act into effect?" *McCombie* v. *Davies*, 6 East, 538. The taking possession of personal property under a contract of purchase is an act based on the assumption of ownership, or a right of dominion over the thing converted, where the vendor is without title, and although without evil intent, is a conversion for which trover lies without previous demand. The intent with which the wrongful act is done on the part of the defendant is not an essential element of the conversion. It is enough that the true owner has been deprived of his property by the unauthorized act of some person who assumes dominion or control over it. It is the effect of the act which constitutes the conversion: Edwards on Bailment, sec. 162; Cooley on Torts, 534, 538, 688; *Flanders* v. *Colby*, 28 N. H. 34; *Boyce* v. *Brockway*, 31 N. Y. 490; *Morrill* v. *Moulton*, 40

Vt. 242. Hence the conversion may consist simply of a purchase, even by an innocent party, of goods or other personal chattels from one who has himself been guilty of a conversion in disposing of them, where the buyer takes the goods or chattels into his possession or custody. The authorities to this point are numerous and overwhelming. As trover and replevin are concurrent remedies for the owner whenever the taking is wrongful, any case in which replevin without a demand has been supported is an authority for the maintenance of trover. In *Galvin* v. *Bacon*, 11 Me. 29, 25 Am. Dec. 258, the plaintiff being the owner of a horse bailed him to A for use for a limited time, under the expectation of a purchase by the latter. During the time, A, for a valuable consideration and without notice, sold the horse to B, and he in like manner to the defendant. Held, that no previous demand was necessary to enable the owner to maintain replevin against the last purchaser. The court say: "Whoever takes the property of another, without his assent, expressed or implied, or without the assent of some one authorized to act in his behalf, takes it in the eye of the law tortiously. That is unlawful which is not justified or warranted by law; and of this character may be some acts which are not attended with any moral turpitude."

In *Hyde* v. *Noble*, 13 N. H. 494, 38 Am. Dec. 508, it was held that a party purchasing property from one who has no right to sell, and holding it to his own use, is guilty of a direct act of conversion, without any demand and refusal. Parker, C. J., said: "The purchase by the defendants, taking possession as they appear to have done, and holding it as their own property, was a conversion. They received the possession from one who had no authority to deliver it to them, under a sale which purported to vest the property in them; and they by their purchase undertook to control it as their own property. This was an assumption of power over it, inconsistent with the rights of the plaintiff. Purchasing property from one who had no right to sell, and holding it to their own use, is a direct act of conversion, without any demand or refusal. Their possession was unlawful at its inception, by reason of the want of authority in Kenniston to make the transfer. It is only where the party obtains the possession lawfully that it is necessary to show a demand and refusal." In *Freeman* v. *Underwood*, 66 Me. 233, the court say: "But the defendants by the purchase and possession of the berries, although acting in good

faith and in ignorance of the want of title in their vendors, assumed thereby an ownership, and exercised a dominion over the property, which rendered them liable in trover to the true owner, without any demand therefor." In *Farley* v. *Lincoln*, 51 N. H. 579, 12 Am. Rep. 182, the court say: "At the time of the assignment the plaintiffs were the absolute general owners, and were entitled to the immediate possession of the goods. The assignment passed no title, and conferred no right upon the defendant in respect of the goods as against the plaintiffs, for the obvious reason that Sanborn had no right or title in them as against the plaintiffs which he could confer on anybody. This being so, the first act of possession exercised by the defendant over them was inconsistent with and in derogation of the plaintiffs' rights. Absolute ownership draws possession after it. If, then, the defendant's act in taking possession was an interference with the plaintiffs' right of actual possession growing out of the ownership, it was in legal effect a disturbance of their constructive possession. The defendant's act in assuming dominion over the property was none the less an invasion of the plaintiffs' right, and none the less a trespass, because he did not intend a wrong, or know that he was committing one. An encroachment upon a legal right must constitute a legal wrong; and it is familiar law that intention is of no account in a civil action brought by one man to recover damages for a wrongful interference with his property by another."

In *Stanley* v. *Gaylord*, 1 Cush. 536, 48 Am. Dec. 643, which is a leading case, it was held that a *bona fide* purchaser from one who had the actual possession of the property, but without any right to retain possession as against the lawful owner, and an actual taking of it, under such purchase, into custody of the purchaser, would subject him to an act of trespass or trover at the suit of the lawful owner, without any previous demand. In *Trudo* v. *Anderson*, 10 Mich. 358, it was held that where one's property is disposed of, without authority, by the person having it in charge, the owner may bring replevin therefor without a previous demand, and that he may do this, notwithstanding the property is in the hands of one who has purchased it in good faith, and without notice of the title of the real owner. "Why," said Christian, J., "should the right of the plaintiff to recover his property be made to depend upon the good faith of the defendant, when that good faith is no defense against the plaintiff's right of property or possession

when a previous demand has been made. . . . . We do not think the question of intent or good faith in a party receiving possession from a wrongful taker in such cases, and where the owner has been guilty of no negligence or wrong, can have any bearing on the right of recovery in a civil suit for the property or its value; and such is clearly the weight of authority both in England and the United States." And in a late case in the same state (*Hake* v. *Buell*, 50 Mich. 90), it was held that trover for goods sold without the owner's authority or ratification may be brought against the purchaser without formally demanding the goods beforehand. In *Wells* v. *Ragland*, 1 Swan, 501, it is held that where the possession of property is obtained from one who had no right to transfer it, a right of action by the owner against the transferee accrues as soon as the latter acquires possession of it; that the bare taking of possession under such circumstances constitutes a new conversion, and that from the time of the commission of that act the statute will commence running. In *Harpending* v. *Meyer*, 55 Cal. 557, it was held that when the possession of property is obtained—in good faith or otherwise—from one who has no right to transfer it, a right of action by the owner against the transferee accrues as soon as the latter acquires possession, and no demand or further act of conversion is necessary.

So far as can be readily obtained, the weight of authority in England and the United States is, that a demand is deemed unnecessary: See Maine: *Parsons* v. *Webb*, 8 Greenl. 38; 22 Am. Dec. 220; *Whipple* v. *Gilpatrick*, 19 Me. 427; *Galvin* v. *Bacon*, 11 Id. 28; 25 Am. Dec. 258; *Freeman* v. *Underwood*, 66 Me. 229; *Bodick* v. *Coburn*, 68 Id. 170; *Prime* v. *Cobb*, 63 Id. 202; Massachusetts: *Stanley* v. *Gaylord*, 1 Cush. 536; 48 Am. Dec. 643; *Riley* v. *Boston Water-Power Co.*, 11 Cush. 11; *Chapman* v. *Cole*, 12 Gray, 141; 71 Am. Dec. 739; *Gilmore* v. *Newton*, 9 Allen, 171; 85 Am. Dec. 749; *Heckle* v. *Lervey*, 101 Mass. 344; 3 Am. Rep. 366; *Carter* v. *Kingman*, 103 Mass. 517; *Bearce* v. *Bowker*, 115 Id. 129; Michigan: *Trudo* v. *Anderson*, 10 Mich. 357; 81 Am. Dec. 795; *Hake* v. *Buell*, 50 Mich. 90; Illinois: *Gibbs* v. *Jones*, 46 Ill. 319; Nevada: *Whitman Mining Co.* v. *Tritle*, 4 Nev. 494; *Ward* v. *Carson R. W. Co.*, 13 Id. 44; California: *Harpending* v. *Meyer*, 55 Cal. 557; Mississippi: *Johnson* v. *White*, 13 Smedes & M. 584; Kansas: *Shoemaker* v. *Simpson*, 16 Kan. 52; Arkansas: *McNeill* v. *Arnold*, 17 Ark. 154; New Hampshire: *Hyde* v. *Noble*, 13 N. H. 494; 38 Am Dec. 508; *Lovejoy* v. *Jones*, 30 N. H. 164; 51 Id. 580; Pennsyl-

vania: *Carey* v. *Bright*, 58 Pa. St. 70; Vermont: *Riford* v. *Montgomery*, 7 Vt. 411; *Grant* v. *King*, 14 Id. 367; *Courtis* v. *Cane*, 32 Id. 232; 76 Am. Dec. 174; *Deering* v. *Austin*, 34 Vt. 330; *Bucklin* v. *Beale*, 38 Id. 653; Georgia: *Robinson* v. *McDonald*, 2 Ga. 116; Wisconsin: *Eldred* v. *Oconto Co.*, 33 Wis. 133; *Oleson* v. *Merrill*, 20 Id. 487; 91 Am. Dec. 428; Maryland: *Harker* v. *Dement*, 9 Gill, 7; 52 Am. Dec. 670; Tennessee: *Wells* v. *Ragland*, 1 Swan, 501; Oregon: *Surles* v. *Sweeney*, 11 Or. 24; *contra:* New York: *Barrett* v. *Warren*, 3 Hill, 348; *Tallman* v. *Turck*, 26 Barb. 167. But see *Bates* v. *Conkling*, 10 Wend. 389; Indiana: *Wood* v. *Cohen*, 6 Ind. 455; 63 Am. Dec. 389; Connecticut: *Parker* v. *Middlebrook*, 24 Conn. 207.

It will be noticed that the New York authorities distinguish a delivery to the purchaser, and a taking of the property out of the vendor's possession: *Nash* v. *Mosher*, 19 Wend. 431; *Ely* v. *Ehle*, 3 N. Y. 506; *Fuller* v. *Lewis*, 13 How. Pr. 219. It was said in *Ely* v. *Ehle*, *supra*, "if the goods be delivered by the bailee trespass lies not against the person to whom they are delivered; but if sold or taken without delivery, trespass would lie for the taking," etc. And in *Barrett* v. *Warren*, 3 Hill, 348, it was held to be a general rule that trespass will not lie against one who comes to the possession of goods by delivery without fault on his part, although it should turn out that the person who made the delivery had no title and was a wrong-doer Without approving these subtile distinctions, still in that view, their application cannot be fitted to the facts of this record. When Dillard, the warehouseman, accepted the order, and by which he agreed to ship the wheat on Merrill's order and by his direction, he acted in derogation of and in hostility to the rights of the plaintiff, his bailor, and in violation of the terms of the bailment, which the plaintiff, it would seem, was authorized to treat as terminated. Their evident purpose was by their act to affect the possession of the wheat in recognition of the rights of ownership derived from the sale by Owens. Certainly, the bailment terminated when Dillard, by direction of Merrill, and in obedience to his order, took the wheat of the plaintiff from the warehouse without his consent and put it aboard of the cars, consigned to his principals, the defendants Allen and Lewis, as their property. The effect of such acts or conduct was to restore his bailor, the plaintiff, to his right of possession. Nor were the defendants — considered as one — the mere passive recipients to whom the wheat was delivered. It was they who took the active initiative, and put

in motion the overt act which took and put the wheat, or delivered it aboard the cars as their property, whereby the plaintiff lost control of — was deprived of — his property. It was not on his own motion that Dillard removed the wheat from the warehouse to the cars; he did it at the instance of the defendant Merrill, the agent of the defendants Allen and Lewis, and he acted for him and upon his order when he wrongfully took the wheat from the place where it was deposited, and put it aboard of the cars for the purpose of asportation, consigned to Merrill's principals, the defendants Allen and Lewis, as their property. So that in this view, it cannot aid the case of the defendants, although the law, as already shown, is decisive of this case, without resort to such subtile distinctions.

There is also another phase of this case to which it is necessary to advert. It is not clear that the defendant Merrill was in the situation of a person who dealt in good faith and in ignorance of the plaintiff's title. Leaving out of the question that after the purchase from Owens and the acceptance of his order on the warehouseman, that the wheat was subsequently taken and removed upon Merrill's order, the whole testimony, as well as his own, tends to show a state of facts from which it might be inferred, on grounds of ordinary business prudence, that he knew the nature of the contract between Owens and the plaintiff. The evidence discloses that he sought the plaintiff for the purpose of purchasing his wheat, and found out from him of his sale to Owens. It is hardly to be supposed that he would offer to pay the advance which Owens had made without making inquiry into the facts, and that when the plaintiff refused to substitute him to the place of Owens, he understood the ground of such refusal. It is probable that he expected, and at that time seemingly without danger from a knowledge, perhaps, of a fancied security in the character of the person with whom he was dealing, that the contract between Owens and the plaintiff would work out all right, and that what was done might be done without incurring any great risk. Still, if he knew that Owens was without title, whatever may have been his reliance in the matter, and bought the wheat, he was bound to know that Owens had no right to give an order for its delivery, to be shipped subject to his order, and that the warehouseman, Dillard, had no right to accept such order, or deliver the wheat to him for his principals, or to be transported to them

without the consent of the plaintiff. In such a case, it would seem that no demand was necessary. Again, I am inclined to think that the defendants are chargeable with notice of the duties which the law imposes on a warehouseman, whose employment in its nature is public, and the relation which he sustains to his depositors understood,—and among these duties, the chief of which is, not to deliver the goods or grain deposited to any person other than the depositor, except on his order, or by his consent or authority.

There is no pretense that the defendants, or any of them, had such consent, nor did Dillard, according to the verdict. It would follow, then, if the defendants are chargeable with notice of his want of authority to deliver, even their reception of the wheat would be a wrongful taking, and therefore render a previous demand unnecessary. However this may be, cases of the kind under consideration bear no analogy to, and stand on a different footing from, those where the owner of property clothes another with the apparent title or power of disposition, whereby third parties are induced to deal with him. In such cases, the principle is well settled that such innocent purchasers shall be protected in their title. But the rights of such purchasers do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes or estops him from disputing, as against them, the existence of the title, or power which he caused or allowed to appear to be vested in the party making the sale or conveyance: *Cowdrey* v. *Vandenburgh*, 101 U. S. 572. Hence it has been held where one deposits wheat for storage, knowing that it is to be commingled with wheat purchased by the owner of the warehouse, and that the latter is selling and publicly shipping from the common mass, he thereby confers a apparent ownership and authority to sell, and is estopped to assert his title as against an innocent purchaser in the usual course of business: *Preston* v. *Witherspoon*, 109 Ind. 457; 58 Am. Rep. 417. In the case at bar, the party selling had no *indicia* of ownership or power to sell, or the warehousemen authority to deliver, so that neither title was conferred, nor lawful possession given or taken, which precluded the plaintiff as owner from asserting his title and the right to the immediate possession of his property as against the purchasers, however innocent of evil intent, by suit without previous demand. "They received the possession from one who had no authority to deliver it to them, under a sale which

purported to vest the property in them; and they by the purchase undertook to control it as their own property. This was an assumption of power over it inconsistent with the rights of the plaintiff": *Hyde* v. *Noble, supra.* The possession of the defendants was not a mere custody, without reference to the question of title or ownership of the property, as in the case of a common carrier who receives property from one not rightfully entitled to the possession and in ignorance of the title of the true owner; but it was a possession given and taken in pursuance of the contract of sale, and on the assumption of ownership, and the right to exercise dominion and control over it. In such case, good faith, or the absence of evil intent, can not infuse validity into the transaction, nor make a possession rightful which is exercised in derogation of the rights of the true owner to control and enjoy his property. Nor is the plaintiff "bound to tender an issue, or litigate a question upon the grievance or innocence of a party who contests his right to the property," and by his evidence shows that he claimed it adversely to him.

The judgment must be affirmed.

CAVEAT EMPTOR IS RULE ON SALE OF CHATTELS: *Brown* v. *Gray*, 72 Am. Dec. 563, and note 566; note to *Scott* v. *Hix*, 62 Id. 460.

MERE POSSESSION OF ANOTHER'S PROPERTY is not such evidence of ownership or authority to sell that third persons have the right, as against the owner, to rely thereon: *Spraights* v. *Hawley*, 100 Am. Dec. 452, and note 458; *Johnson* v. *Frisbie*, 96 Id. 508; *Fawcett* v. *Osborn*, 83 Id. 278, note 285.

CONVERSION TO SUSTAIN TROVER, WHAT CONSTITUTES: *Tinker* v. *Morrill*, 94 Am. Dec. 345, and note 349; *Gilmore* v. *Newton*, 85 Id. 749, and note; *Woodman* v. *Hubbard*, 57 Id. 310, and note.

MOTIVE IN CONVERSION is only material to resist recovery of exemplary damages: *Hacker* v. *Dement*, 52 Am. Dec. 670, note 680.

NO DEMAND IS NECESSARY where the taking is actual and tortious: *Gilmore* v. *Newton*, 85 Am. Dec. 749, note 751; but it is where the possession was first gained legally: *Buel* v. *Pumphrey*, 56 Id. 714, and note; and the same rule prevails in replevin: *Oleson* v. *Merrill*, 91 Id. 429, note 432; *Buttles* v. *Haughwout*, 89 Id. 401; *Trudo* v. *Anderson*, 81 Id. 795.

PURCHASE IN GOOD FAITH, FROM ONE who has no right to sell, is not a good defense to an action for conversion: *Hills* v. *Snell*, 6 Am. Rep. 216.

WHATEVER WILL SUPPORT REPLEVIN WILL SUPPORT TROVER: *Oleson* v. *Merrill*, 91 Am. Dec. 429, and note 432.

PURCHASER FROM AGENT OF OWNER WILL BE PROTECTED: *Carmichael* v. *Buck*, 70 Am. Dec. 226, note 230.

PURCHASER FROM ONE WITHOUT TITLE or authority to sell gets no title: *Saltus* v. *Everett*, 32 Am. Dec. 541. The vendee can get no better title than the vendor possesses: *Agnew* v. *Johnson*, 62 Id. 303, note 307.

OWNER OF CHATTEL CANNOT BE DIVESTED OF TITLE WITHOUT HIS CONSENT. It is a general rule of law, sustained by an unvarying course of decisions, that the owner of property cannot be divested of it except by his consent or by legal process: *Williams* v. *Merle*, 11 Wend. 80; 25 Am. Dec. 604, and note 606; *Quinn* v. *Davis*, 78 Pa. St. 15, 18; *Ventress* v. *Smith*, 10 Pet. 161, 174; or in other words, the vendor of a chattel can transfer no more than the interest which he lawfully has therein: *Burton* v. *Curyea*, 40 Ill. 320; 89 Am. Dec. 350, and note 361; *Bradeen* v. *Brooks*, 22 Me. 463; *Agnew* v. *Johnson*, 22 Pa. St. 471; 62 Am. Dec. 303; *Ripley* v. *Dolbier*, 18 Me. 382; *McMahon* v. *Sloan*, 12 Pa. St. 229; 51 Am. Dec. 601, and note 607. Therefore a purchaser from one having no title gets none, for he who has no title can convey none, and a bad title is not made good by the ignorance of the purchaser of its defects; nor his want of knowledge of a better title: *Barnes* v. *Meeds*, 8 Ired. 292; 49 Am. Dec. 390; *Williamson* v. *Williamson*, 3 Smedes & M. 715; 41 Am. Dec. 636; *Fawcett* v. *Osborn*, 32 Ill. 411; 83 Am. Dec. 278, and note 285. Nor by the fact that he is an honest *bona fide* purchaser: *Saltus* v. *Everett*, 20 Wend. 267; 32 Am. Dec. 541; *Williams* v. *Merle*, 11 Wend. 80; 25 Am. Dec. 604, and note 606, 615. This rule might perhaps be less broadly stated, and be extended in its application to those not only having no title, but also to those having no authority to sell, although these latter are included in several cases among the exceptions to the general rule: *Williams* v. *Merle*, 11 Wend. 80; 25 Am. Dec. 604, and note 606; *Saltus* v. *Everett*, 20 Wend. 267; 32 Am. Dec. 541, and note 554, and cases herein, *post*. This rule, however, obtains only to the advantage of the rightful owner: *Ventress* v. *Smith*, 10 Pet. 161, 174, and cases cited herein, *ante*.

POSSESSION ONLY PRIMA FACIE EVIDENCE OF TITLE. — Possession of personal property is *prima facie* evidence of title, good as against everybody but the rightful owner; merely parting with the possession by the owner affords no conclusive evidence of a change of title: *Magee* v. *Scott*, 9 Cush. 148; 55 Am. Dec. 49, and note 52; *Avery* v. *Clemons*, 18 Conn. 306; 46 Am. Dec. 323, and note 325; *Wright* v. *Solomon*, 19 Cal. 64; 79 Am. Dec. 196, and note 203; *Bergen* v. *Riggs*, 34 Ill. 170; 85 Am. Dec. 304; *Spraights* v. *Hawley*, 39 N. Y. 441; 100 Am. Dec. 452, and note 458; *Dick* v. *Cooper*, 24 Pa. St. 217; 64 Am. Dec. 652; *Fawcett* v. *Osborn*, 32 Ill. 411; 83 Am. Dec. 278, and note 285. The rule being that the mere possession of a chattel is not, as in case of negotiable paper or money, assurance of title or authority to dispose of it, and he who assumes to deal or intermeddle with personal property not his own must see to it that he has a warrant therefor from some one who is authorized to give it: *Spraights* v. *Hawley*, 39 N. Y. 441; 100 Am. Dec. 452, and note 458. Therefore, as was said in *Ketchum* v. *Brennan*, 53 Miss. 596, 607, "a buyer must beware of purchasing from one who has not title, — possession is not title. It is *prima facie* evidence of title, but nothing more. A buyer should not content himself with *prima facie* title. It cannot avail him as against the title. It will until the presumption arising from possession is removed, but when the *prima facie* title is destroyed by proof that, while title seemed to be in the possessor, it was in truth in another, the *prima facie* title must yield to the actual title. A buyer may trust to appearances; but if they prove false and delusive, he takes the risk, and must abide the result. . . . . Whether the possessor of property has borrowed it or hired it or purchased it, and what is the nature and extent of his right to it, should be ascertained by him who proposes to deal with him as to such property," since the true owner may follow his property and reclaim it wherever found: *Fawcett* v. *Osborn*, 32 Ill. 411; 83 Am. Dec. 278. So the mere possession of

a mortgaged chattel by the mortgagor is not such evidence of ownership or authority to sell the property as will protect, against the claim of the mortgagee, one who, as agent of the mortgagor, sells the property, and pays the proceeds in good faith to his principal, in the belief that he was the true owner: *Spraights* v. *Hawley*, 39 N. Y. 441; 100 Am. Dec. 452; and the bare possession of a horse by an army officer with the consent of the quartermaster having charge of horses belonging to the government, and the sale of such horse by him to another, although a *bona fide* purchaser, are not sufficient to pass title to the purchaser: *Johnson* v. *Frisbie*, 29 Md. 76; 96 Am. Dec. 508.

NO DISTINCTION BETWEEN GOVERNMENT SALE AND PRIVATE SALE AS TO CONFERRING TITLE. — Where a stolen horse was sold at a private government sale, it was held that the vendee acquired no title as against the rightful owner; there being no distinction in this respect between a public sale by the government and a sale by a private individual: *Black* v. *Jones*, 64 N. C. 318, 320; and see also *Wilson* v. *Crocket*, 43 Mo. 216; 97 Am. Dec. 389.

WHERE GOODS ARE LOST OR STOLEN OR OBTAINED BY FINDING. — Loss by accident, theft, or robbery does not divest the owner of goods of their title, nor give a *bona fide* purchaser of them a title: *Saltus* v. *Everett*, 20 Wend. 267; 32 Am. Dec. 541, 546; but see *Jones* v. *Mellis*, 41 Ill. 482; 89 Am. Dec. 389, and note 391. Since no title can pass through a thief, those who buy of him should be compelled to give up the property, unless they have converted it, when they should be held for its value: *Koch* v. *Branch*, 44 Mo. 542; 100 Am. Dec. 324. And it makes no difference as to a purchaser from a thief of stolen goods, whether the larceny be larceny at the common law, or larceny as defined by the modern English and American authorities; the value of the goods may be recovered by the owner without regard to the innocence or good faith of the parties making the purchase: *Breckenridge* v. *McAfee*, 54 Ind. 141, 148. So the finding of goods, or the obtaining of them by any other means, enables a vendor of personal property to sell no more than the interest which he legally possesses, nor may he, by such sale, deprive the true owner of his lawful right to claim either the article so sold or restitution therefor, even against a *bona fide* purchaser: *Wilson* v. *Crocket*, 43 Mo. 216; 97 Am. Dec. 389, and note 392.

SALES IN MARKET OVERT. — The ancient rule of the common law was that title to personal property could not be acquired from one who had himself no title in general, except by a *bona fide* sale in market overt: *Carmichael* v. *Buck*, 10 Rich. 332; 70 Am. Dec. 226. This doctrine, however, of sales in market overt, protecting the buyer, is not recognized as of any force in this country: *Ventress* v. *Smith*, 10 Pet. 161, 176; *Wilson* v. *Crockett*, 43 Mo. 216; 97 Am. Dec. 389, 390; 2 Schouler on Personal Property, ed. 1884, sec. 19; *Koch* v. *Branch*, 44 Mo. 542; 100 Am. Dec. 324, 326; *Hoffman* v. *Carow*, 22 Wend. 285, and note; *Rogers* v. *Huie*, 1 Cal. 429; 54 Am. Dec. 300; *Saltus* v. *Everett*, 20 Wend. 267; 32 Am. Dec. 541; *Worthy* v. *Johnson*, 8 Ga. 236; 52 Am. Dec. 399; *Wheelwright* v. *Depeyster*, 1 Johns. 471; 3 Am. Dec. 345; *Levi* v. *Booth*, 58 Md. 305; 42 Am. Rep. 332; *Hosack* v. *Weaver*, 1 Yeates, 478; *Easton* v. *Worthington*, 5 Serg. & R. 130; *King* v. *Richards*, 6 Whart. 418, and notes; 25 Am. Dec. 607; 70 Am. Dec. 230.

WHERE THE CHARACTER OF THE PROPERTY STOLEN IS CHANGED, OR IS ENHANCED IN VALUE BY LABOR. — Where a trespasser cuts trees from the owner's land and converts them into railroad ties, and they are thereafter purchased by one in good faith, it is held that the owner is not divested of

his title thereto, but may recover the specific property. The court said: "The rule is well established, with scarcely an exception, that where the identity of the original article can be traced, the right of property in the original owner continues to exist. . . . . When the identity of the original article is lost, we can easily well see how the title is gone from the original owner, as where grapes have been converted into wine, or timber into a house, or corn into whisky, or where railroad ties have become part of the road. In all such cases it will be adjudged as a matter of law that the identity of the article is destroyed, and the rights of the innocent purchaser will be protected. There has been such a mechanical transformation of the article as to destroy its identity, and the mere fact that the timber can be traced into a building, or the corn to the distillery in which the whisky was made, or out of which it was made, is not such an identification of the property as would authorize its recovery. . . . . If the timber had been worked into the depot buildings of the company, or made part of the road-bed by laying it down as ties, this annexation to the principal improvement would have divested the owner of title. . . . . When an accidental appropriation or a conversion is made under a mistake of fact, it is conceded that under certain circumstances the purchaser must look alone to his action for damages. The general doctrine is, that the accession of mere value by the application of skill and labor alone is insufficient to divest the owner of title. Exceptions are to be found to this rule," however, and in cases of wanton trespassers, the rule is more strict than in cases of mistake: *Strubbee* v. *Trustees Cincinnati R'y*, 78 Ky. 481; see Newmark on Sales, sec. 182.

BONA FIDE PURCHASER FROM VENDEE UNDER CONDITIONAL SALE. — The current of authority is, that a party who purchases chattels in good faith from a vendee, under a conditional sale, acquires no right thereto as against the original vendor, if no negligence can be imputed to the latter in asserting his claim: *Sargent* v. *Metcalf*, 5 Gray, 306; 66 Am. Dec. 368, and note 369; *Sumner* v. *Woods*, 67 Ala. 139; 42 Am. Rep. 104, and note 105; *Burbank* v. *Crocker*, 7 Gray, 158; 66 Am. Dec. 470; *Ketchum* v. *Brennan*, 53 Miss. 596, 607. Provided, always, that there is an express stipulation that no title shall pass till the price is paid: *Dunbar* v. *Rawles*, 28 Ind. 225; 92 Am. Dec. 311, and note 317; *Bailey* v. *Harris*, 8 Iowa, 331; 74 Am. Dec. 312, and note 313. But see *Haggerty* v. *Palmer*, 6 Johns. Ch. 437; *Keeler* v. *Field*, 1 Paige, 315; *Smith* v. *Lynes*, 5 N. Y. 41. And also provided that the conditional vendor is guilty of no laches: *Crocker* v. *Gullifer*, 44 Me. 491; 69 Am. Dec. 118; *Sargent* v. *Metcalf*, 5 Gray, 306; 66 Am. Dec. 368, and note 369. The reason of the above rule is, that the vendee under a conditional sale is deemed, as a general rule, only a bailee for a specific purpose, and having only the bare right of possession, he has therefore no title to confer on others by a sale to them: *Harkness* v. *Russell*, 118 U. S. 663; Newmark on Sales, sec. 19; *Ketchum* v. *Brennan*, 53 Miss. 596, 607. So a purchaser in good faith from one holding a sewing-machine under a conditional sale obtains no title against the conditional vendor: *Singer M'fg. Co.* v. *Graham*, 8 Or. 17; 34 Am. Rep. 572. And in another case, where S. purchased of the defendant company a safe on credit, under a contract that the safe was to be the property of the company until the price was paid, and subsequently S. sold and delivered the safe to the plaintiff, who bought and paid for it in good faith, without knowledge of the contract between S. and the company, it was held that the plaintiff only acquired such title in the safe as his vendor had, and that the company was the owner: *Marvin Safe Co.* v. *Norton*, 48 N. J. L. 412; 57 Am. Rep. 566. In the following case it would seem that this rule

was carried to its extreme limit. The facts were these: The plaintiff sold a chattel to G. on condition that it should remain the plaintiff's until paid for, and gave him a receipted bill of sale therefor, omitting, at G.'s request, any statement of the condition. The defendant bought the chattel of G., without notice of the condition, after having been informed by the plaintiff that he had sold it to G., and after having seen the bill of sale, but before G. had paid the plaintiff for it. It was held that, in the absence of fraud, the plaintiff was not estopped to claim the chattel from the defendant: *Zuchtman* v. *Roberts*, 109 Mass. 53; 12 Am. Rep. 663. Though in Pennsylvania, where furniture was sold upon the written agreement of the purchaser to pay not less than five dollars a week until the price was paid, the goods to remain the property of the seller, subject to removal upon failure to make any or all of such payments, and the furniture was delivered to the purchaser, who failed to make any payment, and sold it to a third person who had no knowledge of the agreement, it was held that the latter obtained a valid title: *Stadtfield* v. *Huntsman*, 92 Pa. St. 53; 37 Am. Rep. 661, and note 664; and see *Kintiel* v. *Cushing*, 57 Tex. 354, 44 Am. Rep. 598, where the registration laws seem to be the governing factor as to whether such subpurchaser may hold such chattels. The leading case of *Harkness* v. *Russell*, 118 U. S. 663, 678, quoted from in note 57 Am. Rep. 575, exhaustively reviews the law in the different states upon this point, so that it is unnecessary to make here more than a very brief summary from that opinion as to some of the states. It is there said that there has been some diversity of opinion in New York in relation to the title of a *bona fide* purchaser from a vendee who holds property under a contract for a conditional sale; and the authorities in that state are there fully considered. It is also there said that the Illinois rule is, that a *bona fide* purchaser from a conditional vendee, without notice, has a valid title. Also, that by recent statutes in Maine, Vermont, and Iowa it is declared that no such agreement in regard to personal property shall be valid against third persons without notice. As to the differing rule in Pennsylvania and some other states, and the reasons upon which they are based, see opinion in said case *in extenso;* also Newmark on Sales, secs. 19, 193, 194.

EXCEPTIONS TO THE GENERAL RULE. — *Cash, Bank Bills, etc.* — The most notable exception to the rule that the vendor can confer by sale no greater title than he himself has, and that the true owner cannot be divested of his title without his consent, except by legal process or some improvidence of his own, exists in the case of cash, bank bills, notes, checks, and other negotiable instruments payable to bearer and transferable by delivery in the ordinary course of business to a person taking them *bona fide* and for value. The rule being "well settled at common law that the *bona fide* holder of money or negotiable paper transferable by mere delivery, and not overdue, who has taken it in the usual course of business and for a valuable consideration, acquires a perfect title. . . . . This exception to the common-law rule, that the purchaser of a chattel can acquire no better title than the vendor had, has been adopted, because, in the language of Lord Kenyon in *Lawson* v. *Weston*, 4 Esp. 56, the contrary principle 'would at once paralyze the circulation of all paper in the country, and with it all its commerce'": *Jones* v. *Nellis*, 41 Ill. 482; 89 Am. Dec. 389; *Fawcett* v. *Osborn*, 32 Ill. 411; 83 Am. Dec. 278; 2 Schouler on Personal Property, ed. 1884, sec. 20; Newmark on Sales, sec. 174; *Saltus* v. *Everett*, 20 Wend. 267; 32 Am. Dec. 541; and see note 25 Id. 610.

Stolen Bank Bills. — So the holder of a bank bill stolen before issuance, who receives it *bona fide* in the usual course of business for value, may recover

on it against the bank, though he was guilty of even gross negligence in taking it, there being no evidence of fraud: *Worcester Bank* v. *Dorchester Bank*, 10 Cush. 488; 57 Am. Dec. 120, and note 122.

Note Transferable by Delivery. — A note transferable by delivery, if not overdue or apparently dishonored, may, in the ordinary course of business, in good faith, and for a valuable consideration, be transferred so as to vest a valid title in the transferee, although stolen from the true owner or deposited with the transferrer for some special purpose, and without authority to transfer it: *Wheeler* v. *Guild*, 20 Pick. 545; 32 Am. Dec. 231, and note 238.

Stolen Government Bonds. — The sale by a thief of a government bond to a purchaser in good faith for value, without notice, passes a good title: *Jones* v. *Nellis*, 41 Ill. 482; 89 Am. Dec. 389, and note 391.

Stolen Stock Certificates. — A *bona fide* purchaser of certificates of stock, standing on the company's books in the name of the former owner, regularly indorsed by him, and stolen from the present owner without his fault, gets no title: *Barstow* v. *Savage Min. Co.*, 64 Cal. 388; 49 Am. Rep. 705; see *Sherwood* v. *Meadow Valley Min. Co.*, 50 Cal. 412.

Warehouse Receipts are not negotiable so as to enable the person holding them to transfer a greater right or title to the property mentioned in them than he has himself. They stand in the place of the property itself; the delivery of the receipts has the same effect as the delivery of the property, — no greater, no less; and a transfer of a warehouse receipt by a person in possession gives no higher title than would the transfer of the property to the same person: *Burton* v. *Curyea*, 40 Ill. 320; 89 Am. Dec. 350, and note 361.

Bill of Lading or Other Document Describing or Symbolizing Property Sold. — A bill of lading fraudulently made, whereby the goods of one person are shipped to or in the name of another, without the consent or knowledge of the former, will not enable the latter to transfer the goods even to an innocent purchaser for value in the ordinary course of business: *Saltus* v. *Everett*, 20 Wend. 267; 32 Am. Dec. 541. So the vendee of chattels will not acquire any title thereto if the vendor has none to transfer, even when the sale is made or confirmed by the transfer of a bill of lading or other document symbolizing and describing the property sold: *Burton* v. *Curyea*, 40 Ill. 320; 89 Am. Dec. 350, and note 361.

Negotiable Paper must be Purchased in Good Faith and for Value — Degree of Prudence Required. — The transferee of lost or stolen negotiable paper must, to acquire a valid title thereto, have both paid a valuable consideration and have taken it *bona fide*: *Vairin* v. *Hobson*, 8 La. 50; 28 Am. Dec. 125; since if circumstances are existing which are calculated to raise suspicion in the mind of a man of ordinary prudence and discretion, such fact will prevent a purchaser of such paper from acquiring title better than that of his vendor: Id.

OTHER EXCEPTIONS — SALE FOR CASH — VENDEE IN POSSESSION WITHOUT PAYMENT. — Where the sale is made for cash, but the goods are delivered without payment being made, such condition will be presumed to have been waived, and a purchaser *bona fide* from the vendee acquires a good title: *Leedom* v. *Phillips*, 1 Yeates, 527; *Backentoss* v. *Speicher*, 31 Pa. St. 324. See also note to 25 Am. Dec. 614.

TITLE OR RIGHT TO RECLAIM RESERVED. — "Some of the cases, not following the current of authority, raise another exception in the case of an immediate sale under which the purchaser takes possession, with a condition annexed to pay the price at a future day or the vendor may reclaim the goods, or a stipulation that the title shall remain in him until the price is

paid, in which events the title of a subpurchaser without notice of the condition or stipulation is held to prevail over that of the vendor": Newmark on Sales, sec. 174.

ANOTHER'S APPARENT OWNERSHIP — POWER OF DISPOSAL MAY BE DIRECT OR INFERRED. — The consent of the owner to the disposition of his property may be inferred from acts as well as given in direct terms. It may be inferred when the owner gives such evidence of the authority of disposal as usually accompanies such authority according to the custom of trade and the general understanding of business men: *Wright* v. *Solomon*, 19 Cal. 64; 79 Am. Dec. 196. The rule in cases of this character is thus given in *Quinn* v. *Davis*, 78 Pa. St. 15, 18, where it is declared that although "the owner of a chattel cannot, apart from legal process, be divested of his title to it except as a consequence of some unlawful or improvident act of his own, yet the transfer of possession to another, without more, is not such an act. It must be accompanied by something to indicate the existence in the custodian of some right of property or power of alienation. There must be proof of language or conduct that is at least equivocal." And the general rule stated in *Saltus* v. *Everett*, 20 Wend. 267, 32 Am. Dec. 541, 549, is, that "the owner may lose the right of recovering his goods against purchasers by exhibiting to the world a third person as having power to sell and dispose of them; and this, not only by giving a direct authority to him, but by conferring an implied authority. Such an authority may be implied by the assent to and ratification of prior similar dealings, so as to hold such person out to those with whom he is in the habit of trading as authorized to buy or sell. It may be inferred from the business of the agent with fit accompanying circumstances. 'If a man,' says Bayley, J., in *Pickering* v. *Busk*, 15 East, 44, 'puts goods into another's custody, whose common business it is to sell, he confers an implied authority to sell.' . . . . But this implied authority must arise from the natural and obvious interpretation of facts according to the habits and usages of business, and it never applies where the character and business of the person do not warrant the reasonable presumption of his being empowered to sell property of that kind. If, therefore, ... a person intrusts his watch to a watch-maker to be repaired, the watch-maker is not exhibited to the world as an owner or agent, and credit is not given as such because he has possession of the watch. The owner therefore would not be bound by his sale." Therefore, if the owner of goods furnishes another with *prima facie* evidence of a power of disposal, he is bound by a sale made by such person to a third party buying in good faith: *Saltus* v. *Everett*, Id., and note 554; note 25 Am. Dec. 611.

SAME — AGENTS AND FACTORS. — "In regard to the dealings with agents and factors, it is very clear . . . . that the bare possession of goods by one, though he may happen to be a dealer in that class of goods, does not clothe him with power to dispose of the goods as though he were owner, or as having authority as agent to sell or pledge the goods, to the preclusion of the right of the real owner. If he sells as owner, there must be some other *indicia* of property than mere possession. There must . . . . be some act or conduct on the part of the real owner whereby the party selling is clothed with the apparent ownership or authority to sell, and which the real owner will not be heard to deny or question, to the prejudice of an innocent third party, dealing on the faith of such appearances. If it were otherwise, people would not be secure in sending their watches or articles of jewelry to a jeweler's establishment to be repaired, or cloth to a clothing establishment to be made into garments": *Levi* v. *Booth*, 58 Md. 305; 42 Am. Rep. 332, 337; *Kock*

v. *Branch*, 44 Mo. 542; 100 Am. Dec. 324. So it was held in *Carmichael* v. *Buck*, 10 Rich. 332, 70 Am. Dec. 226, that a *bona fide* purchaser, without notice, of personal property from an agent, will be protected where, although the agent is intrusted with possession for a special purpose, the principal has, by his act or conduct, allowed the agent to appear to the world as the true owner.

SAME — MERCHANT ENGAGED IN SIMILAR BUSINESS. — The delivery of goods to a merchant engaged in the sale of similar articles is such evidence of the bestowal of the right to dispose of the same as to protect the purchaser from the possessor: *Wright* v. *Solomon*, 19 Cal. 64; 79 Am. Dec. 196.

SAME — BAILEES FOR SPECIAL PURPOSE — PLEDGEES. — Bailees for a special purpose have no right to sell the property bailed, and upon such sale the real owner may replevy it from the vendee: *Emerson* v. *Fisk*, 6 Greenl. 200; 19 Am. Dec. 206; Newmark on Sales, sec. 187. So where a horse is delivered by the owner to an agent to sell for him, and the agent wrongfully sells the same in payment of his own debt, the owner is not thereby divested of his title, even against a subsequent purchaser: *Parsons* v. *Webb*, 8 Me. 38. And where the pledgee without restriction sells a pledge before the debt matures, this constitutes a conversion, as a rule, and the purchaser takes no title: *Bailey* v. *Colby*, 34 N. H. 29; Newmark on Sales, secs. 185, 186. So where the owner of a diamond ring put it in the hands of a jeweler to match it, or, failing in that, to get an offer for it, and the jeweler sold it to the defendants, it was held that, even if the defendants acted in good faith, they got no title: *Levi* v. *Booth*, 58 Md. 305; 42 Am. Rep. 332. It was said in the last case that if "the real owner of the goods has so acted as to clothe the seller or pledgor with apparent authority to sell or pledge, he will, even by the common law, be precluded from denying, as against those who may have acted *bona fide* on the faith of that apparent authority, that he had given such authority, and the result as to them is the same as if he had really given it." And see note 25 Am. Dec. 615.

PURCHASER FROM FRAUDULENT VENDEE ANOTHER EXCEPTION. — Possession of personal property is one *indicium* of ownership, and is *prima facie* evidence of title. When to that is added proof of an actual sale and delivery to him having such possession by the real owner, though by *fraudulent pretenses*, a subsequent sale by such purchaser to a *bona fide* purchaser, without notice of any fraud in the alleged sale and delivery to his vendor, has been held to confer title on such purchaser: *Fawcett* v. *Osborn*, 32 Ill. 411; 83 Am. Dec. 278. Since, although an owner of personal property cannot be divested of it without his consent, yet if he consent to its transfer, though such consent be only temporary, and obtained by fraud, and therefore revocable as against such unfair purchaser, yet an honest purchaser from him will be protected, and the first owner must bear the loss: *Jennings* v. *Gage*, 13 Ill. 610; 56 Am. Dec. 476, and note 480. This rule is well stated in *Moody* v. *Blake*, 117 Mass. 23, 19 Am. Rep. 394, where it is declared by the court to be "well settled that where a vendor is induced by fraudulent representations to deliver property to a dishonest or irresponsible purchaser, yet if that purchaser transfers it for a valuable consideration to a third person having no notice of the fraud, and acting in good faith, such third person will hold the property in preference to the original seller": Citing *Hoffman* v. *Noble*, 6 Met. 68; *Rowley* v. *Bigelow*, 12 Pick. 307; see also *Saltus* v. *Everett*, 20 Wend. 267; 32 Am. Dec. 541; Newmark on Sales, sec. 174; *Sinclair* v. *Healey*, 40 Pa. St. 417; *Le Grand* v. *Eufaula Nat. Bank*, 81 Ala. 123; 60 Am. Rep. 140; *Bradeen* v. *Brooks*, 22 Me. 463; *Ripley* v. *Dolbier*, 18 Id. 382; and

notes 32 Am. Dec. 554; 25 Id. 613. So a party making advances on the security of such goods in good faith, without notice of any fraud, is a *bona fide* purchaser under this rule: *Hoffman* v. *Noble*, 6 Met. 68; 39 Am. Dec. 711, and note 716; and the purchaser obtains also a good title against the creditors of the original vendor: *Parker* v. *Crittenden*, 37 Conn. 152, 153. So where A, falsely representing himself to be a member of a firm, bought, in the name of the firm, goods from B, who sent them by a carrier to the firm, and on the refusal of the firm to receive them A sold them to C, to whom they were delivered by the carrier at A's request, it was held that A had no title to the goods, and that an action for conversion would lie by B against C, although the latter was a purchaser in good faith: *Moody* v. *Blake*, 117 Mass. 23; 19 Am. Rep. 394; and "where goods were obtained by sale on credit under a forged recommendation and guaranty, and then sold to a *bona fide* purchaser in the customary course of trade, the second buyer is protected in his possession against the defrauded original owner": *Mowry* v. *Walsh*, 8 Cow. 243; cited in *Saltus* v. *Everett*, 20 Wend. 267; 32 Am. Dec. 541, 547. But where one purchases property from one holding it fraudulently, he can only hold title thereto provided he obtained it in good faith, and without notice of his vendor's wrongful possession; otherwise he holds it subject to the same remedies enforceable against it had it remained in his vendor's hands: *Rateau* v. *Bernard*, 3 Blatchf. 244; since it is required, in order that a purchaser from a fraudulent vendee may be protected, that such purchaser must have parted with value upon the apparent title of the wrong-doer and his right to dispose of the property: *Barnard* v. *Campbell*, 58 N. Y. 73; 17 Am. Rep. 208.

JUDICIAL SALES.—In case of judicial sales, the purchaser obtains the defendant's title, and none other. Judgment and execution liens attach to the defendant's real instead of his apparent interest in property, therefore a sale made under such lien can transfer no greater interest than the defendant had when the lien attached, or which he subsequently may have acquired thereto before the sale. The decisions unwaveringly sustain the rule that a sale of chattels under a writ against one person cannot affect the title of another person. But the purchaser acquires whatever title the defendant may have had: Freeman on Executions, secs. 301, 335. The doctrine of *caveat emptor* also requires that the purchaser examine the title, and he is presumed to know what he is acquiring by his purchase, since the officer cannot warrant the title: *McCulley* v. *Hardey*, 13 Brad. App. 631; *Roberts* v. *Hughes*, 81 Ill. 130. "And where no fraud has been practiced, and no misrepresentations made as to the condition of the title, if loss ensues the purchaser must bear it": *Roberts* v. *Hughes*, 81 Id. 132. So a purchaser at an execution sale obtaining land at a great sacrifice, by means of a fraudulent combination, gets no title, and can convey none to another, although the latter is a *bona fide* purchaser without notice: *Barnes* v. *Meeds*, 8 Ired. 292; 49 Am. Dec. 390. It is said, however, in Newmark on Sales, sec. 180, that there are decisions which are of a seemingly opposite tendency to the rule above given in regard to judicial sales. That the rule of *caveat emptor* applies to all execution sales, and that the officer can make no valid warranty, and that the purchaser gets only the debtor's title, is the current doctrine, see *Reichenback* v. *McKean*, 95 Pa. St. 432, 434; *Coyne* v. *Souther*, 61 Id. 457; *Storm* v. *Smith*, 43 Miss. 497; *Lang* v. *Waring*, 25 Ala. 625; *Strouse* v. *Drennan*, 41 Mo. 289; *Griffith* v. *Fowler*, 18 Vt. 390; *Oberther* v. *Stroud*, 33 Tex. 522; *Boyd* v. *Longworth*, 11 Ohio, 235; *Harnsmith* v. *Epsey*, 19 Iowa, 444; *Danley* v. *Rector*, 10 Ark. 211; *Boggs* v.

Hargrave, 16 Cal. 559. But in the last case the doctrine *caveat emptor* is said to apply only to sales made on valid judgments.

Sale by Prize Court, without Jurisdiction.— A sale of captured goods by order of a prize court of the captor established in a neutral country does not change the title of the property since such court is without jurisdiction: *Wheelwright* v. *Depeyster*, 1 Johns. 471; 3 Am. Dec. 345.

EXECUTORS, ADMINISTRATORS, AND TRUSTEES. — Inasmuch as the authority given to executors and administrators to sell is a personal trust, and exists only by virtue of statutory provisions, the authority must be strictly pursued, and unless every essential direction of the law is complied with, no title passes as against those whose interests are affected by the authority to sell, unless, from long acquiescence, a presumption arises that all the requisites of the law had been complied with: *Ventress* v. *Smith*, 10 Pet. 161, 174. It being the rule that no warranty of title is implied in sales by executors, administrators, or trustees, the maxim *caveat emptor* applies in regard to title: *Ware* v. *Houghton*, 41 Miss. 370; 93 Am. Dec. 258. Therefore, sales by an executor or administrator are void if made without order of court, or in any manner not authorized by law; and property so sold may be recovered by the distributees or legatees, from the parties holding it under the sale: *Ware* v. *Houghton*, 41 Miss. 370; 93 Am. Dec. 258, and note 264; *Worthy* v. *Johnson*, 8 Ga. 236; 52 Am. Dec. 399, and note 406; *Williamson* v. *Williamson*, 3 Smedes & M. 715; 41 Am. Dec. 636. So the purchaser of slaves at a sale made under a void order of the probate court cannot plead as an excuse for failure to rescind, by returning, or offering to return, the slaves, the fact that he did not discover the defect of title until after the emancipation of the slaves, and that he could not then return them: *Ware* v. *Houghton*, 41 Miss. 370; 93 Am. Dec. 258. But it is said that the rule that executors making sales of personal property must comply strictly with the statutory provisions concerning them, may be somewhat relaxed in favor of innocent purchasers: *Worthy* v. *Johnson*, 8 Ga. 236; 52 Am. Dec. 399, 406, citing *Wyman* v. *Campbell*, 6 Port. 219; 31 Am. Dec. 677; *Doe ex dem. Duval* v. *McLoskey*, 1 Ala. 708; *Jennings* v. *Jenkins*, 9 Id. 285.

BROKER PURCHASING FOR PRINCIPAL. — A broker who purchases property from one who has no title, for value, and *bona fide*, and who ships it to his principal, is liable in trover to the true owner: *Williams* v. *Merle*, 11 Wend. 80; 25 Am. Dec. 604, and note 606.

PURCHASER OF CARGO FROM MASTER OF SHIP. — A master of a ship has ordinarily no authority to sell the cargo; and a sale by him, unless in a case of necessity, does not affect the title of the true owner: *Saltus* v. *Everett*, 20 Wend. 267; 32 Am. Dec. 541. But a master of a ship may sell shipper's goods in case of absolute necessity: Note 25 Am. Dec. 616.

PARTY MERELY QUALIFIED OWNER, NO RIGHT TO PLEDGE GOODS. — A party having only a qualified property in goods cannot pledge them any more than a factor can pledge the goods of his principal for his own debt: *Agnew* v. *Johnson*, 22 Pa. St. 471; 62 Am. Dec. 303.

PURCHASER'S REMEDY WHERE NO TITLE VESTS IN HIM. — A purchaser who becomes unable to return property before he discovers the defect of title of the vendor is remediless, unless he has protected himself by covenants of warranty; and this rule applies to sales by executors and administrators: *Ware* v. *Houghton*, 41 Miss. 370; 93 Am. Dec. 258; although it is held that a warranty of title is implied in the sale of a chattel by one having possession, and selling as his own; and a promise to refund the money paid is im-

plied if the seller has no title: *Barton* v. *Faherty*, 3 G. Greene, 327; 54 Am. Dec. 503, and note 505. So the price paid for a stolen chattel may be recovered from the thief in *assumpsit*, although the thief has not been tried for the felony: Id. But absence of notice of conflicting claim, and of circumstances calculated to arouse suspicion, will not protect a *bona fide* purchaser for value when he buys of one having neither title nor authority to sell: *Saltus* v. *Everett*, 20 Wend. 267; 32 Am. Dec. 541.

OWNER'S REMEDIES. — Where chattels have been wrongfully sold to another, by a person having only the temporary or actual possession, but not the ownership, under any of the circumstances above enumerated, the owner may maintain replevin for the recovery of the specific goods, or if the property itself has passed beyond the owner's reach, he may have an action for the value of the goods against the person who has so purchased them: *Sharp* v. *Parks*, 48 Ill. 511; 95 Am. Dec. 565, and note 567; *Wilson* v. *Crockett*, 43 Mo. 216; 97 Am. Dec. 389, and note 392; *Rogers* v. *Huie*, 1 Cal. 429; 54 Am. Dec. 300, 302; *Carmichael* v. *Buck*, 10 Rich. 332; 70 Am. Dec. 226, and note 230.

SAME — INSTANCES. — Where one to whom property has been bailed for a specified time violates his trust, and transfers the property to another, the owner may maintain replevin or trover against the latter, although the term of the bailment has not expired, and even though he is a purchaser in good faith: *Dunlap* v. *Gleason*, 16 Mich. 158; 93 Am. Dec. 231, and note 233; *Burton* v. *Curyea*, 40 Ill. 320; 89 Am. Dec. 350, and note 361. So the vendor in conditional sale is entitled to recover in replevin or trover from any purchaser from his vendee the full value of the property if a return cannot be had, although a less sum was due from the vendee on his contract, for the absolute title is in the vendor: *Dunbar* v. *Rawles*, 28 Ind. 225; 92 Am. Dec. 311, and note 317; and such recovery may be had in case of a conditional sale, after notice by the original vendor to a second purchaser that he owns part of the goods, without more particularly designating the articles claimed by him: *Burbank* v. *Crooker*, 7 Gray, 158; 66 Am. Dec. 470. Nor is a previous demand necessary to maintain replevin against a purchaser from one without title who sells without authority: *Trudo* v. *Anderson*, 10 Mich. 357; 81 Am. Dec. 795; and no demand is necessary against an innocent purchaser of stolen goods after he has sold them to another person, for the reason that such sale is an actual conversion, and trover may be maintained in such case: *Courtis* v. *Cane*, 32 Vt. 232; 76 Am. Dec. 174. But the general owner cannot maintain replevin or trover against a *bona fide* purchaser from his bailee if he placed the property in the hands of the bailee for any other than a legitimate purpose, or if he is fairly chargeable with any negligence by means of which the bailee was enabled to impose upon the purchaser: *Burton* v. *Curyea*, 40 Ill. 320; 89 Am. Dec. 350, and note 361.

EVIDENCE — BURDEN OF PROOF — PRESUMPTIONS. — The burden of proof in an action on a bank bill shown to have been stolen is not on the plaintiff to show that he obtained it fairly, and under such circumstances as entitle him to maintain an action on it. The burden is on the defendant to show that the plaintiff did not so receive it: *Wyer* v. *Dorchester etc. Bank*, 11 Cush. 51; 59 Am. Dec. 137, and note 140; *Worcester Bank* v. *Dorchester Bank*, 10 Cush. 488; 57 Am. Dec. 120, and note 122. But it is otherwise as to a stolen note or bill of exchange: *Worcester Bank* v. *Dorchester Bank*, *supra*. Since, if negotiable paper has been lost or stolen, or obtained by duress, or put in circulation by fraud, upon proof of these circumstances, it is incumbent upon

the plaintiff to show that he purchased such paper *bona fide* and for a valuable consideration: *Beltzhoover* v. *Blackstock*, 3 Watts, 20; 27 Am. Dec. 330. Although the possession of chattels creates a presumption of ownership, yet the *prima facie* case may be rebutted by circumstances attending the possession, or by positive proof: *Bergen* v. *Riggs*, 34 Ill. 170; 85 Am. Dec. 304; and if another person desires to make out a title, he has the burden of proof to show how he came by it, and to explain why it is not in his own custody: *Dick* v. *Cooper*, 24 Pa. St. 217; 64 Am. Dec. 652. So, in order "to make either a sale or a pledge valid as against the real owner, where the sale or pledge is made by another person, it is incumbent upon the person claiming such sale or pledge to show that the party making it had authority from the owner": *Levi* v. *Booth*, 58 Md. 305; 42 Am. Rep. 332, 334; and acts of ownership of the possessor of a chattel inconsistent with another's ownership must be brought to the knowledge of the true owner to divest him of title: *McMahon* v. *Sloan*, 12 Pa. St. 229; 51 Am. Dec. 601.

SAME — ACTS AND DECLARATIONS. — Acts and declarations of the possessor of personal property concerning the same are admissible in evidence to determine the nature of such possession, although not made in the presence of one claiming ownership in the property: *Avery* v. *Clemons*, 18 Conn. 306; 46 Am. Dec. 323, and note 325. So declarations of a party in possession of property, that he held in his own right, or under another, are admissible in evidence as part of the *res gestæ*, but his declarations beyond this are no part of the *res gestæ*, and cannot be received as such: *Abney* v. *Kingsland*, 10 Ala. 355; 44 Am. Dec. 491, and note 497; and a receipt by the bailee acknowledging ownership of the general owner in the property bailed is admissible as part of the *res gestæ* in an action of replevin brought by the latter for the property after the bailee has wrongfully transferred it to another: *Burton* v. *Curyea*, 40 Ill. 320; 89 Am. Dec. 350; though declarations made by the owner of a chattel inconsistent with his ownership will not divest him of title, unless acted upon by the purchaser: *McMahon* v. *Sloan*, 12 Pa. St. 229; 51 Am. Dec. 601.

ALLEN AND LEWIS *v.* AGEE AND MILLER.

[15 OREGON, 551.]

DELIVERY SUFFICIENT TO COMPLETE SALE. — Where agent of purchaser buys wheat stored in a warehouse, and orders it delivered on cars, and it is removed from the warehouse and put in the cars by rightful act duly authorized, after which the cars are side-tracked awaiting transportation, this is sufficient delivery to the purchaser to exempt the wheat from liability to seizure under a writ of replevin at the instance of a third party who claims title to it.

J. W. Hamilton and J. P. Watson, for the appellants.

W. R. Willis, for the respondents.

By Court, LORD, C. J. The plaintiffs are partners, doing business under the firm name of Allen and Lewis. The complaint alleges, in substance, that plaintiffs are the owners and entitled to the possession of 315 sacks of wheat, marked "No.

13," of the value of $408, and in possession of R. Koehler, receiver of the O. & C. R., a common carrier, delivered to him by plaintiffs to be carried from Dillard to Portland, Oregon; that on the twenty-fifth day of September, 1886, at Dillard, Douglas County, Oregon, defendants wrongfully took the same from the possession of said Koehler, and detained the same, to the plaintiffs' damage, etc. After denial, the defendants, for a separate answer, allege, in substance, that the firm of Bremner and Buxton were the owners of this wheat, and that on the twenty-fifth day of September, 1886, commenced an action to recover the same from W. F. Owens and J. M. Dillard, and by an indorsement on the affidavit filed therein, required the defendant B. C. Agee, sheriff, "to take said property in the complaint herein described into his possession"; that the wheat was in the possession of the defendant James Dillard as warehouseman; that said affidavit and indorsement therein, with an undertaking, was delivered to defendant Agee, and that defendant Miller was his deputy, and that the defendant Miller, on the date aforesaid, in accordance with said authority, took said property into his possession from the defendant James Dillard, etc.; and further, that the property taken was the property of said Bremner and Buxton, and that they were entitled to the possession.

The reply put in issue the material facts, and the trial resulted in a verdict and judgment for the defendants, from which comes this appeal. The evidence as disclosed by the bill of exceptions is to this effect: That one Merrill, at the times mentioned, was the agent of the plaintiffs in buying and shipping wheat; that the wheat in dispute had been stored in the warehouse of James Dillard, at Dillard Station, by Messrs. Bremner and Buxton; that Merrill purchased a lot of wheat subsequently of W. F. Owens, including the wheat in dispute, for which he (Owens) gave him an order on Dillard, in writing, who accepted the order in writing on the twentieth day of September, 1886; that Bremner and Buxton gave their written order to J. M. Dillard to ship their wheat subject to the order of W. F. Owens; that the railroad company had no regular agent at Dillard Station, but when notified that goods were to be transported, left cars on the side-track at the warehouse to receive them; that Merrill ordered the cars of the agent at Roseburg sent out to Dillard to receive the wheat, and had him make out shipping receipts for three car-loads; that the cars were sent there in accordance with his direc-

tions, and loaded with wheat by Dillard out of his warehouse, including the wheat in dispute, who made out his memoranda, "locked the cars, and left them for the train, and had nothing more to do with the wheat or cars"; that subsequently, and on the twenty-fifth day of September, 1886, Messrs. Bremner and Buxton, as plaintiffs, commenced an action against Owens and Dillard, as defendants, to recover said wheat, and that the defendants in the present action, as such officers, as alleged on the order referred to, and on the day last aforesaid, took the wheat in controversy out of the cars in which it was loaded into their possession. From the pleadings and the evidence thus adduced, it will be seen that the trial was devoted mainly to determining who had possession of the wheat at the time the defendant officers took it from the cars in the action of *Bremner and Buxton* v. *Owens and Dillard.*

The error assigned in the instructions given by the court are all directed to this point, that the evidence showed a delivery to the railroad and a possession by them for the plaintiffs. This is the contention of counsel for the plaintiffs, and is the marrow of the case. The purchase and the authority to deliver the wheat is not disputed, only that any actual possession of the property had been taken by the railroad company. The evidence shows that the railroad company placed the cars on the side-track at the warehouse, at the instance of the agent of the plaintiffs, for the purpose of receiving, with other, the wheat in dispute for the plaintiffs, and that it was removed from the warehouse and put in the cars in pursuance of this purpose, and by rightful act duly authorized. But it is contended that this did not constitute a delivery of the wheat to the plaintiffs, because the company having no regular agent at that place, there was no acceptance, and consequently that the wheat still remained in the possession of Dillard at the time of the seizure by the defendant officers. The agent of the plaintiffs, or what is the same thing, the plaintiffs, were the contractors for the shipment of this wheat; their agent had not only selected the railroad company as its carrier, but by agreement the company had sent its cars at the place designated by him to receive the wheat for the plaintiffs, and when in pursuance of that agreement the wheat was delivered aboard of the cars, it must necessarily have been with their knowledge and consent.

In *Illinois Central R. R. Co.* v. *Smyster*, 38 Ill. 360, 87 Am. Dec. 301, the court say: "The side-track and the cars be-

long to the company, and are under their exclusive control; and there is no question that the company placed this car at a point opposite the wharf-boat on which the cotton was stored, for the express purpose of having it transferred from the boat to the car, that they might transport it to the point desired by the shipper. The company had unquestionably the exclusive use and control of their road, side-tracks, and freight cars; no use could be made of them without the consent of the company. So long as a car remained on their road or side-track, it was under their control, and necessarily in their possession. They had the right to permit their cars to stand at the point at which this one was placed. The company at any moment, at least after the car was loaded, had the unquestioned right to remove it to any other part of their road, but the commission merchant had no such right, even if he had possessed the means. . . . . The wharf-boat, on the contrary, with its contents, was in the possession of the commission men, and the cotton so continued until it was placed in the car. It then passed into the possession of the company as effectually as if it had been delivered in their warehouse. They substituted their car for their warehouse, no doubt for the mutual convenience of all parties. And this, too, with the assent of the company, to promote their interest, in the prosecution of the business for which it was created. If this was a box-car, the company had the right as soon as the cotton was placed in it to have closed and locked it, or if an open car, they had an equal right to have secured the cotton, and any person interfering with it would have been a trespasser, and the company could have recovered damages for any injury thus perpetrated. No difference is perceived in receiving freight on the platform of their depot and into their cars at any place on their road or side-track; or whether it is placed there by their employees or by other persons, so it is done with the assent of the company."

The case in hand possesses all these features, strengthened by some other additional facts. Here the side-track and the cars belonged exclusively to and were under the control of the company. They placed their car on the side-track at the warehouse, by request and agreement, where the grain in dispute was stored, for the express purpose of having it transferred from the warehouse to the car, that they might transport it to the point desired by the shipper. Nor could any one use and control their road, side-track, and freight cars with-

out their consent, and necessarily they must have been in their possession. When the cars were loaded, the company could move them, but no other person could without their consent. Dillard says he had authority to load the cars, and the company had given him the keys, and he testifies that "he loaded the wheat, locked the cars, and left them for the train to take, and had nothing more to do with the wheat or cars."

Could any acts be more decisive of a delivery to or acceptance by the carrier, or company, than by placing cars at a side-track of a warehouse and giving keys to the person authorized to load the cars, and his putting the wheat aboard of them and locking them up? Could it be said, in such a case, that the wheat was put in the car without the knowledge or consent of the company? Or can it be doubted that when the wheat was taken from the warehouse and placed in the cars, that it did not then pass into the possession of the company as effectually as if it had been delivered in their warehouse? In this case, the cars of the company took the place of a warehouse, and it was done, not only for the mutual convenience of the parties, but by an express understanding with the company that the cars should be placed by them on the side-track at the warehouse to receive the wheat, and when loaded on the cars in accordance therewith, necessarily was done with the knowledge and assent of the company, and consequently was a delivery to or acceptance by them, which is one and the same thing. The wheat, therefore, was not in the possession of Dillard and Owens, but of the company for the plaintiffs, and was a good delivery to the defendants.

The further objection was also made to the admission of the affidavit for delivery and indorsement thereon against objection, on the ground that it did not sufficiently describe the property, and that the statute was not complied with or followed in the order for taking the property from the defendant. The court entertains some doubts as to the sufficiency of the order, for the last reason suggested, but has concluded to pass it.

The judgment must be reversed.

SALE OF GOODS IN STOREHOUSE, what delivery sufficient to make sale valid: *Kimberly* v. *Patchin*, 75 Am. Dec. 334, note 343; *Cushing* v. *Breed*, 92 Id. 777; *Hall* v. *Boston etc. R. R. Co.*, 92 Id. 783; *Cleaveland* v. *Williams*, 94 Id. 274; *Claflin* v. *Rosenberg*, 97 Id. 336, note 340–348; *Southwestern etc. Co.* v. *Stanard*, 100 Id. 255; *Russell* v. *Carrington*, 1 Am. Rep. 498.

CASES

IN THE

SUPREME COURT

OF

ARKANSAS.

BOGY *v.* ROBERTS.

[43 ARKANSAS, 17.]

HUSBAND CANNOT BE TENANT BY CURTESY OF LANDS OF WHICH HIS WIFE WAS NEVER SEISED; and if he sells his interest, and, as guardian, that of his children also, in lands of his deceased wife, of which he was tenant by the curtesy, and invests the proceeds of the sale in other lands, the title to which he takes to himself as guardian of his children, he will not be entitled to curtesy in the lands so purchased by him.

PURCHASE OF LAND BY FATHER IN NAME OF HIS CHILDREN IS PRESUMED TO BE ADVANCEMENT to them by him, and the equitable as well as the legal title vests in them. And the fact that the father takes possession, makes improvements, and receives the rents and profits, is not sufficient to show that an advancement was not intended.

EJECTMENT. The opinion states the case.

W. P. and A. B. Grace, for the appellant.

W. E. Hemingway, for the appellee.

By Court, COCKRILL, C. J. A father who was tenant by curtesy sold his life interest in his deceased wife's lands, and at the same time, having obtained an order of the probate court for that purpose as guardian of his minor children, sold their estate in the lands, and invested the entire proceeds in the purchase of other real estate, taking the title to himself as guardian of the children. This was in 1873. He entered into possession after the purchase, put improvements on the land, enjoyed the rents and profits. and maintained his chil-

dren. One of the daughters who is now married brings this action of ejectment against him for the possession of her undivided interest in the lands.

The father set up the facts above stated in his answer, and prayed that he be allowed "to hold and enjoy said lands to his own use during his natural life, as by curtesy in lieu of his estate in the lands sold." The court held, upon demurrer, that the answer presented no defense. The defendant submitted to judgment for the possession of an undivided interest in the lands, and appealed.

No objection has been made to the plaintiff's right to maintain an action at law for possession upon the deed to her father or guardian. The only question pressed here or below is the appellant's claim to a life interest in the land.

1. The appellant had no estate as tenant by curtesy in the lands in suit, because his wife was never seised of them.

2. The purchase of land by the father in the name of his children is presumed to be an advancement to them by him, and the equitable as well as the legal estate vests in them: *Kemp* v. *Cossart*, 47 Ark. 62; *Robinson* v. *Robinson*, 45 Id. 481; *Milner* v. *Freeman*, 40 Id. 62.

Where the proof does not make it clear and manifest that a trust only was intended by the purchase, equity follows the law, and leaves the estate with the child. The father's possession, making improvements, and enjoying the rents after his purchase, were at one time held to evince the intention that an advancement was not intended. The doctrine, however, never had a firm foothold in authority, and is now exploded: Perry on Trusts, secs. 145, 146. Lord Eldon said, in *Finch* v. *Finch*, 15 Ves. 50, the principle that the purchase is presumed *prima facie* to be an advancement is not to be frittered away by refinements. Judge Story, in his work on Equity Jurisprudence, adds: "It is perhaps rather to be lamented that it has ever been suffered to be broken in upon by any sort of evidence of a merely circumstantial nature": 2 Story's Eq. Jur., sec. 1203; *Grey* v. *Grey*, 2 Swanst. 594; see *Kemp* v. *Cossart*, and *Robinson* v. *Robinson*, *supra*.

It may be an unfilial act, or, as Lord Notthingham expressed it in *Grey* v. *Grey*, *supra*, "not in good manners," for the daughter to contradict the right of the father to the rents during his life; but his answer does not present the facts upon which the courts can interfere to prevent it.

Affirmed.

CURTESY, WHEN HUSBAND ENTITLED TO: See *Breeding* v. *Davis*, 46 Am. Rep. 740; *Carter* v. *Dale*, 31 Id. 660; *Carr* v. *Givens*, 15 Id. 747; *Malone* v. *McLaurin*, 90 Am. Dec. 320, note 322, where other cases in that series are collected.

ADVANCEMENT, WHAT CONSTITUTES: See *Rickenbacker* v. *Zimmerman*, 30 Am. Rep. 37; *Woolery* v. *Woolery*, 95 Am. Dec. 630, note 636, where other cases in that series are collected.

STATE *v.* WARD.

[48 ARKANSAS, 36.]

PRISONER IS IN JEOPARDY IN CRIMINAL CASE, when in a court of competent jurisdiction a jury is impaneled and sworn to try him under an indictment sufficient in form and substance to sustain a conviction. He is then entitled to a verdict which will bar further prosecution for the same offense, and an unnecessary discharge of the jury without his consent does not deprive him of the right to the bar.

CONSENT OF PRISONER THAT JURY MAY SEPARATE DURING RECESS OF COURT is not a consent that one of the jurors may absent himself and necessitate the discharge of the jury.

DEFENDANT HAS NOT BEEN IN JEOPARDY BY ANY PROCEEDING SHORT OF VERDICT OR JUDGMENT, where the indictment was so defective that the defendant, if found guilty, would have been entitled to have the judgment entered thereon reversed for error.

INDICTMENT FOR EMBEZZLEMENT OF MONEY MUST DEFINITELY DESCRIBE THE MONEY EMBEZZLED, and a general description thereof, as so many dollars of good and lawful money of the United States, is not sufficient.

INDICTMENT for embezzlement. The opinion states the case.

Dan W. Jones, *attorney-general*, for the appellant.

By Court, COCKRILL, C. J. Ward was indicted for embezzlement. He demurred to the indictment. The demurrer was sustained to one count and overruled as to the others. A jury was impaneled and sworn, and at the close of the day, the trial not being concluded, they were allowed by the court, upon consent of the parties, to separate. On the second morning of the trial one of the jurors was absent on account of the sickness of a member of his family, and the court then, for the first time, discovering that the defendant had not been arraigned, and had not entered a plea to the indictment, upon the motion of the prosecuting attorney discharged the jury. Ward then moved the court for his discharge, upon the ground that he had been in jeopardy. The court granted his prayer and dismissed the indictment. The state has appealed.

It is the established rule that when a jury in a criminal case is impaneled and sworn in a court of competent jurisdiction

to try the prisoner, under an indictment sufficient in form and substance to sustain a conviction, he is in jeopardy. He is then entitled to a verdict which will bar further prosecution for the same offense, and an unnecessary discharge of the jury without his consent does not deprive him of the right to the bar: *Whitmore* v. *State*, 43 Ark. 271.

The consent of the prisoner to the separation of the jury in the case under consideration cannot be taken as a consent that a juror should absent himself and so necessitate the discharge of the others; and if there were nothing else to prevent the bar, he could not be again tried for the offense charged in the indictment: *Hilands* v. *Commonwealth*, 111 Pa. St. 1; 56 Am. Rep. 235.

2. Arraignment and plea necessarily precede the swearing of the jury, for the jury are sworn to try the issue made by the plea, and it was laid down under the old system that these steps were an essential part of the proceedings, and that without them there could be no valid trial or judgment. If the prisoner stood mute, it was deemed that no trial could be had. If a plea could not be extorted from him, and it was ascertained that he was not dumb *ex visitatione Dei*, he was sentenced as on conviction. But as the legal system developed, methods of procedure yielded in importance to substantial rights, and the courts were authorized to enter a plea of not guilty for the prisoner who declined to plead, and to investigate the question of his guilt upon this enforced plea. The failure to enter the plea for him was still regarded as fatal to the legality of the proceedings, when, to further sink the importance of mere procedure when compared with rights, the legislatures of some of the states enacted that the trial and appellate courts should disregard every error or defect of procedure which did not affect substantial rights.

It has been accordingly held in some of these jurisdictions that the trial and judgment are not affected by the want of a plea where the prisoner has announced himself ready for trial, and has been accorded every advantage his plea could afford him: *State* v. *Hayes*, 67 Iowa, 27; *State* v. *Cassady*, 12 Kan. 550.

But it is unnecessary to consider what effect, if any, under the provisions of our statutes, the absence of arraignment and plea may have had upon the trial in this case, for, upon looking at the indictment, it is discovered to be insufficient to sustain a judgment of conviction; and nothing that could

have been done under it, short of an actual acquittal or conviction, could have conferred upon the accused immunity from further prosecution for the same offense. The statute provides that an acquittal or conviction by a judgment or a verdict shall bar any other prosecution for the same offense, notwithstanding a defect in form or substance in the indictment on which the trial took place: Mansfield's Digest, sec. 2176. But there was no verdict or judgment in this case, and short of these the rule is, that where the indictment is so defective that the defendant, if found guilty, will be entitled to have the judgment entered thereon against him reversed for error, he has not been in jeopardy: 1 Bishop's Crim. Law, sec. 121; *Whitmore* v. *State*, 43 Ark. 271; *Atkins* v. *State*, 16 Id. 568.

3. The indictment charged the embezzlement of money. The only description given of the money in the indictment is so many dollars of good and lawful money of the United States. In the absence of an excuse alleged in the indictment, for the want of a more full and definite description of the money embezzled, we must continue to hold the general description too indefinite and uncertain until the legislature sees fit to alter it: *State* v. *Thompson*, 42 Ark. 517; *Barton* v. *State*, 29 Id. 68; *Commonwealth* v. *Sawtelle*, 11 Cush. 142.

As the judgment of the court in dismissing the indictment was right, it must be affirmed.

ACCUSED IN JEOPARDY WHEN: See *People* v. *Barker*, 1 Am. St. Rep. 501; *Hilands* v. *Commonwealth*, 56 Am. Rep. 235; *Pizano* v. *State*, 54 Id. 511; *Brink* v. *State*, 51 Id. 317; *Nolan* v. *State*, 21 Id. 281; *State* v. *Wilson*, 19 Id. 719; *Lee* v. *State*, 7 Id. 611; *Younger* v. *State*, 98 Am. Dec. 791, note 798, where other cases in that series are collected.

DISCHARGE OF JURY WITH CONSENT OF ACCUSED DISCHARGES FROM INDICTMENT WHEN: See *Hilands* v. *Commonwealth*, 56 Am. Rep. 235; *Pizano* v. *State*, 54 Id. 511; *State* v. *Wilson*, 19 Id. 719; *People* v. *Cage*, 17 Id. 436; *O'Brian* v. *Commonwealth*, 15 Id. 715; *Lee* v. *State*, 7 Id. 611; note to *Wright* v. *State*, 61 Am. Dec. 95, where other cases in that series are collected.

DESCRIPTION OF PROPERTY IN INDICTMENT. — An indictment for robbery of bank bills, alleging their value, but not their denomination, is bad: *Arnold* v. *State*, 21 Am. Rep. 175. An indictment for larceny which describes the property stolen as "one pound of meat" is fatally defective: *State* v. *Patrick*, 28 Id. 340; *People* v. *Ball*, 73 Am. Dec. 631, note 632, where other cases in that series are collected.

STATE *v.* WATTS.

[48 ARKANSAS, 56.]

MALICIOUS MISCHIEF INCLUDES ALL MALICIOUS PHYSICAL INJURIES TO RIGHTS OF ANOTHER which impair utility or materially diminish value, and is an offense under the common law of this country.

INDICTMENT for malicious mischief. The opinion states the case.

Dan W. Jones, attorney-general, for the appellant.

By Court, BATTLE, J. Levi Watts was indicted in the Sebastian circuit court, for the Greenwood district, for malicious mischief committed by him on the tenth day of February, 1885, in the Greenwood district, by then and there unlawfully, willfully, maliciously, and mischievously cutting, tearing down, injuring, and breaking the telephone wire of the Fort Smith, Greenwood, and Waldron Telephone Company, it being of the value of fifty-five dollars. He demurred to the indictment, and the court sustained the demurrer, and discharged him.

The only question in this case is, Was the act charged in the indictment an indictable offense at common law? There was no statute making it a crime at the time it is alleged to have been committed.

It is difficult to state with minute precision what is necessary to constitute malicious mischief at common law. It has been so much legislated upon, and at such an early day, that its common-law limits are indistinct. Blackstone classes it along with larceny and forgery, and, after treating of larceny, says: "Malicious mischief or damage is the next species of injury to private property which the law considers a public crime. This is such as is done, not *animo furandi*, or with an intent of gaining by another's loss, which is some though a weak excuse, but either out of a spirit of wanton cruelty, or black and diabolical revenge, in which it bears a new relation to the crime of arson; for as that affects the habitation, so this does the other property of individuals. And therefore any damage arising from this mischievous disposition, though only trespass at common law, is now, by a multitude of statutes, made penal in the highest degree." And he then enumerates several statutes which elevated it to a felony.

Some judges, relying on this passage, and understanding

the word "trespass" therein according to its modern signification, have denied that the offense of malicious mischief exists under the common law of this country. But upon a careful reading, it is obvious that the word "trespass" is used by Blackstone in this passage in the sense of "misdemeanor." It is used by him in various places in his Commentaries in that sense; as where, speaking of officers who voluntarily suffer prisoners to escape, he says: "It is generally agreed that such escapes amount to the same kind of offense, and are punishable in the same degree as the offense of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass." And again, where he says: "In treason, all are principals, *propter odium delicti;* in trespass, all are principals, because the law, *quæ de minimis non curat*, does not descend to distinguish the different shades of guilt in petty misdemeanors": 1 Bishop's Crim. Law, secs. 568, 569, 625.

Without further discussion, it is sufficient to say that, according to the weight of authority and the better and prevailing opinion, the offense of malicious mischief exists under the common law of this country.

This offense includes all malicious physical injuries to the rights of another which impair utility or materially diminish value. "Thus it has been considered an offense at common law to maliciously destroy a horse belonging to another; or a cow, or a steer, or any beast whatever, which may be the property of another; to wantonly kill an animal where the effect is to disturb and molest a family; to maliciously cast the carcass of an animal into a well in daily use; to maliciously poison chickens; to fraudulently tear up a promissory note, or break windows; to maliciously set fire to a number of barrels of tar belonging to another; to maliciously destroy any barrack, or corn-crib; to maliciously girdle or injure trees or plants kept either for use or ornament; to maliciously break up a boat; to maliciously injure or deface tombs; and to maliciously strip from a building copper pipes or sheeting." These illustrations serve to indicate what is malicious mischief, and the subjects of the offense: Wharton's Crim. Law, 19th ed., secs. 1067, 1076, and authorities cited.

We are satisfied that the act charged in the indictment in this case constitutes the offense of malicious mischief; and that the demurrer to the same should have been overruled. The judgment of the court below is therefore reversed, and

this cause is remanded, with instructions to overrule the demurrer and for other proceedings.

MALICIOUS MISCHIEF, WHAT CONSTITUTES: See *Wright* v. *State*, 76 Am. Dec. 656, note 657, where other cases in that series are collected.

HAMBY *v.* WALL.

[48 ARKANSAS, 135.]

SOLE USE AND OCCUPATION OF COMMON PROPERTY BY ONE TENANT IN COMMON does not create the relation of landlord and tenant between him and his co-tenant, nor render him liable for rent, whether the property be real or personal.

ACTION to recover for use and occupation of lands. The opinion states the case.

T. C. Humphry, for the appellant.

By Court, COCKRILL, C. J. There is no dispute about the facts which control the determination of this controversy. The parties were tenants in common in the ownership of a cotton-gin with the usual running gear and appurtenant fixtures. The defendant was lawfully in possession, and at no time denied the right of his co-tenant to enjoy the common property with him. He insisted upon remaining in possession of his own interest, and reaping the benefit to be derived from it. He offered, however, to let the plaintiff in to operate the gin with him upon an equal footing. He offered, also, to run it one half the time, and turn it over to the plaintiff for his exclusive use the other half, either by taking it week by week about, month about, or in any other way. The plaintiff declined all his overtures, but insisted that if the defendant operated the gin he should pay him rent for his individual interest. The defendant refused to accede to any terms looking to the payment of rent, but ran the gin at his individual expense for the use of the public, and received tolls in payment. When he had operated it a few weeks, the plaintiff instituted this suit against him before a justice of the peace. In the circuit court and here he has treated his action as one to recover for the use and occupation of lands. It is not certain from the record whether the common property is a part of realty occupied by the parties as tenants in common, or whether it is legally separated from the freehold and only a chattel. But in neither event would the plaintiff be entitled to recover.

The jury found, in effect, that the defendant made no profit by operating the gin; and (treating it as the appellant does, as realty) it is a well-settled principle of the common law that the mere occupation by a tenant of the entire estate does not render him liable to his co-tenant for the use and occupation of any part of the common property. The reason is easily found. The right of each to occupy the premises is one of the incidents of a tenancy in common. Neither tenant can lawfully exclude the other. The occupation of one so long as he does not exclude the other is but the exercise of a legal right. If for any reason one does not choose to assert the right of common enjoyment, the other is not obliged to stay out; and if the sole occupation of one could render him liable therefor to the other, his legal right to the occupation would be dependent upon the caprice or indolence of his co-tenant, and this the law would not tolerate: 4 Kent's Com. *369; Freeman on Cotenancy, sec. 258; *Everts* v. *Beach*, 31 Mich. 136; 18 Am. Rep. 169; *Israel* v. *Israel*, 30 Md. 120; 96 Am. Dec. 571; *Fielder* v. *Childs*, 72 Ala. 567; *Hause* v. *Hause*, 29 Minn. 252; *Reynolds* v. *Wilmeth*, 45 Iowa, 693; *Pico* v. *Columbet*, 12 Cal. 414; 73 Am. Dec. 550; *Becnel* v. *Becnel*, 23 La. Ann. 150.

The appellant relies upon the statute of the state which gives to landlords the right to recover a reasonable compensation for the use and occupation of their premises: Mansfield's Digest, sec. 4169; *Byrd* v. *Chase*, 10 Ark. 597; *Mason* v. *Delancy*, 44 Id. 444. But the statute has no application to the occupancy of tenants in common. In the absence of an agreement to pay rent, the relation of landlord and tenant does not exist between them, but each occupies in his own right. There is, therefore, no implied promise to pay for the use of any part: Authorities *supra*. But our statutory remedy for use and occupation of lands applies only when the relation of landlord and tenant exists: *Mason* v. *Delancy*, 44 Ark. 444. The plaintiff's action presupposes a promise to pay rent; otherwise the justice before whom it was instituted could not have entertained jurisdiction. But there was in fact no promise, express or implied. If the property could be regarded as personalty, the rule as to the possession of the parties would not be different: Co. Lit., sec. 323; Freeman on Cotenancy, sec. 245; *Bertrand* v. *Taylor*, 32 Ark. 470.

In no view of the matter has the appellant shown a right to recover, and the judgment of the court is affirmed.

ACTION BETWEEN CO-TENANTS FOR RENTS: See *Hudson* v. *Coe*, 1 Am. St. Rep. 288, note 295, where other cases are collected.

AGREEMENT BY ONE TENANT IN COMMON TO PAY ANOTHER FOR USE of the common property for his own benefit is valid, and enforceable at law: *Davies* v. *Skinner*, 46 Am. Rep. 665. But the fact that one tenant in common has had the entire occupancy of the common estate, and his co-tenants have not occupied it, gives no right of action against him for the value of the use of their interests: *Everts* v. *Beach*, 18 Id. 169.

ST. L., I. M., & S. R'Y *v.* HENDRICKS.

[48 ARKANSAS, 177.]

EVIDENCE THAT MAN WAS ON RAILROAD TRAIN ACTING AS BRAKEMAN between two stations on the road is sufficient to justify the conclusion that he was a regular employee of the company.

WHETHER PARTICULAR ACT OF SERVANT WAS OR WAS NOT DONE IN LINE OF HIS DUTY is a question to be determined by the jury from the surrounding facts and circumstances.

GENERAL OBJECTION TO WHOLE OF WITNESS'S EVIDENCE AS IRRELEVANT must be disregarded, if any part of such evidence is admissible.

EVIDENCE THAT BRAKEMEN ON RAILROAD TRAINS ARE IN HABIT OF EJECTING FROM TRAIN TRAMPS who refuse to pay their fare, is admissible to prove that it is within the line of a brakeman's duty to eject a person for the non-payment of his fare.

ACTION to recover damages for personal injuries. The opinion states the case.

Dodge and Johnson, for the appellant.

Sam W. Williams, *Sol. F. Clark*, *and T. E. Hendricks*, for the appellee.

By Court, COCKRILL, C. J. Fred Cost, who is now dead, brought suit against the appellant to recover damages for personal injuries received, as he alleged in his complaint and swore upon the trial, by being forcibly ejected from a moving train by a brakeman in the employ of the railroad company. The evidence upon the two sides was contradictory upon every material fact, but the plaintiff's case, as put by himself and one other witness, was, that he had been stealing a ride on one of the company's trains by holding to a ladder on the outside of a freight-car. When the train stopped at Cabot station he alighted and concealed himself until it made a fresh start, when he again mounted the ladder. He was there detected by a brakeman, who caused him to mount to the top of the car, and demanded payment of his fare. Cost had no money, and the brakeman ordered him off the train, refusing his

request to wait until the next stand. His manner was threatening, and Cost felt impelled to undertake to descend the ladder, and when he was in the act of doing so, the brakeman kicked at him and stamped upon the backs of his hands, and thus forced him to loose his hold. This caused him to fall when the train was running rapidly. One of his feet was crushed by the wheels, and was partially amputated, leaving the heel intact; but the muscle of his leg shrank away, and the physicians were doubtful as to the recovery of its strength. The testimony of the train-men and of another witness for the company was to the effect that the plaintiff lost his hold, or jumped voluntarily from the ladder, where he was clinging, without having been spoken to or touched by an employee. Cost was an intelligent German boy, about seventeen years of age; the jury accepted his version of the matter, and returned a verdict for five thousand dollars in his favor. The circuit judge directed that a new trial should be granted, unless a *remittitur* of two thousand dollars was entered. The plaintiff remitted the amount indicated, and the company appealed. Pending the appeal, Cost died, and the action has been revived here in the name of his administrator.

The errors assigned by the company for the reversal of the judgment are confined to the admissibility of testimony which the court permitted to go to the jury over its objection, and to the failure of the proof to sustain the verdict. The charge of the court to the jury has not been challenged, and it is not urged that there was a failure of proof, except in this particular, viz., that Cost and the other witnesses were not positive that the man whom they alleged was the cause of the injury was one of the company's employees. Upon his examination in chief, the plaintiff testified that the man alluded to was a brakeman on appellant's train, but on cross-examination he stated he did not know that to be a fact. He gave as the reason for his belief, however, that he saw the man on the platform at Cabot with a lantern deporting himself as an employee; and James Jenkins, his other witness, who rode from Cabot to Little Rock on the train, and corroborated Cost's statement of the accident, testified that the man acted as a brakeman on the train between these points.

If the jury credited the testimony that the man was for such a length of time aiding the company in operating its train, it was sufficient to justify the conclusion that he was a regular employee. Indeed, it would be difficult, in the most

of these cases, to prove the relation of master and servant, except by the fact that the one is known to perform service for the other, or from their course of dealing: 2 Starkie on Evidence, 41–43.

The court instructed the jury that the master could not be held to respond in damages for an injury resulting from the wanton and willful act of a servant, unless the act was done in the discharge of his duty, or while acting within the general scope of his authority. Whether a particular act was or was not done in the line of the servant's duty is a question to be determined by the jury from the surrounding facts and circumstances: *Rounds* v. *Delaware etc. R'y Co.*, 64 N. Y. 129; 21 Am. Rep. 597; *Cohen* v. *Dry Dock Co.*, 69 N. Y. 170.

In order to meet this phase of the proof, the plaintiff offered two witnesses by whom he proposed to show that it was the custom of the brakemen and other employees engaged in operating the defendant's freight trains to eject persons riding without paying their fare. The witnesses testified as to the custom observed by them at a station three miles distant from Cabot. As the introduction of this testimony is the chief reliance of the appellant for reversing the judgment, it may be given, with the objections thereto, in the language of the abstract:—

"Dr. Martin testified for plaintiff as follows: I live at Austin, Arkansas; have resided there ten years; am acquainted with the custom of the defendant's train-hands at Austin; it is a watering-station, three miles north of Cabot; when trains start from there, frequently tramps get on, and I have seen brakemen make them get off; it is seldom that a week would pass that I did not see this." To the admission of the above testimony of Dr. Martin the defendant objected at the time, as incompetent evidence, but the objection was overruled, and defendant saved its exceptions at the time, and the witness then testified as stated.

Upon cross-examination, Dr. Martin said further: "I don't know whether the brakemen put off tramps under orders or not, and I don't know if this was the custom anywhere else or not; I only speak of what I saw at Austin."

Thereupon defendant moved that Dr. Martin's testimony, as above, be excluded from the jury, as wholly incompetent and irrelevant, and calculated to mislead and prejudice the jury; but the court overruled the motion, and defendant saved its exceptions.

The testimony of the other witness was substantially the same as the above, except that he stated that the brakemen performed this duty sometimes before the train started, and at others after it was in motion. As no special objection was made in any form to the statement last quoted, it is not material to consider, apart from the other testimony, whether it was proper to admit it. The objection was general to the whole of the witness's evidence as irrelevant, and if any part of it is admissible the objection falls.

The reason of the rule is, that it prevents trial judges from being misled or entrapped by having their attention directed, under a general objection, to one point, and their judgments reversed upon another, when the objection to that point might have been readily sustained in the first instance.

It is not necessary to follow the exhaustive argument of the appellant's counsel, to the effect that the proof of specific or continuous acts of wantonness, or negligence on the part of the company's employees, has no tendency to establish wantonness or negligence on the particular occasion complained of. The evidence objected to did not tend to show a previous wrongful act. It was the legal right of the company to eject persons attempting to ride on its trains without paying fare, and the legitimate object of the testimony was to show that the right was commonly enforced through the class of employees that ejected the plaintiff. It was a legitimate method of showing the duty of the employee, just as the fact of employment, as we have ruled above, could be shown by the exercise of duties in the master's service. The fact that brakemen commonly performed the duty of ejecting such persons from the appellant's freight trains afforded a reasonable presumption or inference that the brakeman who ejected the plaintiff acted in the line of his duty, if the jury chose to believe that he was ejected by a brakeman for the non-payment of his fare: See *Ward* v. *Young*, 42 Ark. 542.

Finding no error, the judgment is affirmed.

Whether Act of Servant was in Line of his Duty: See *Hoffman* v. *New York Central & H. R. R. R. Co.*, 41 Am. Rep. 337, note 340, where this subject is discussed; *Kline* v. *Central Pacific R. R. Co.*, 99 Am. Dec. 282, note 289, where other cases in that series are collected.

DALE *v.* DONALDSON LUMBER COMPANY.

[48 ARKANSAS, 188.]

AGENT WHO EXCEEDS HIS AUTHORITY, SO THAT HIS PRINCIPAL IS NOT BOUND, will himself be liable for the damage thus occasioned to the other contracting party, although he may have been innocent of any intention to deceive.

PHYSICIAN CALLED IN GENERALLY, WITHOUT LIMITATION AS TO HIS ATTENDANCE, is impliedly engaged to attend the patient through that illness, or until his services are dispensed with.

ACTION for services. The opinion states the case.

Crawford and Crawford, for the appellants.

By Court, SMITH, J. The Donaldson Lumber Company was a corporation of Iowa, engaged in the manufacture of lumber in this state. Putnam was its secretary, treasurer, and general business manager, besides being one of its directors and the owner of nearly one third of its stock. One Watson, a laborer employed by the company, was dangerously wounded, not, however, in the course of his employment, but in a private brawl. Thereupon Putnam sent the following telegram:—

"DONALDSON, ARK., 10–7–1883.

"To DR. DALE, Arkadelphia.

"Come here immediately by quickest means; man shot in breast.

[Signed] "DONALDSON LUMBER CO."

The doctor responded to this by going in person to Donaldson, and giving to the wounded man such treatment as was needed. The visit was repeated, and then, by advice of his friends, and with the encouragement of Putnam, the patient was removed to Arkadelphia for better treatment. He was attended daily by the doctor and his partner in business for the space of six weeks. The bill amounted to $146, and it was charged to the lumber company. At the end of the year payment was demanded of Putnam as the agent and representative of the company.

He denied all liability in the premises, but offered to pay, by way of compromise, ten dollars, the price of the first visit. This proposition was declined, and the physicians brought this action against the company and Putnam to recover compensation for their professional services.

The company denies that Putnam had any authority, express or implied, to bind it to pay for such services. Putnam

also denied his individual liability, although he admitted he sent the message to the doctor, and that he exceeded his authority in signing the name of the corporation. His excuse for this act was, that he was personally unknown to the physician, and he was afraid he would not come if he summoned him in his own name.

A jury was waived, and the trial was had before the court, which found that Putnam was acting in this matter outside of the apparent, as well as real, scope of his authority. It therefore gave judgment in favor of the lumber company. And its finding is, in that behalf, approved. But it further found that Putnam, in sending the telegram, intended to make himself liable for only one visit to Watson, and that the proof fails to establish a known and general usage and custom, that when a physician is called in he is expected to attend the patient through that particular illness. He therefore declared, as a matter of law, that Putnam was liable for one visit, and no more, and gave judgment accordingly. The plaintiffs have appealed.

The facts of the case are not substantially in controversy. There is no doubt that Dr. Dale went to Donaldson and took charge of Watson's case, in reliance upon the telegram; and that he rendered the services in the expectation that the lumber company would pay for them; and that the sole reason why he so believed was the reception of the telegram.

The company, as we have seen, was not responsible; but Putnam was, upon an implied warranty of his authority. "If the agent exceed his authority, so that his principal is not bound, he will himself be liable for the damage thus occasioned to the other contracting party, although he may have been innocent of any intention to defraud": Smith's Mercantile Law, 3d Am. ed., 213.

The only question, then, is as to the extent of Putnam's liability. He testified that he thought it was impossible for Watson to live long, and that his only motive in sending the dispatch was to gratify the wish of a dying man. He also directed Watson's friends, in case Dr. Dale could not come, to send a dispatch for a certain physician at Malvern, and he would be responsible, and pay the expenses.

The plaintiffs, and another practitioner of medicine who was disinterested, stated that it was understood by the profession, when a medical man was called to the bedside of a patient, he was employed to attend him until the case terminated by

death or recovery, unless the medical man was himself discharged sooner.

And the finding of the court that such was not the custom of the country was opposed to all the testimony there was on this point.

But we apprehend this is a question of law rather than of proof. *Ballou* v. *Prescott*, 64 Me. 305, is an instructive case on this subject. That was a case against a surgeon for malpractice, in treating an injury to the plaintiff's leg, the alleged negligence consisting in quitting the case while the patient still needed attention. The court affirmed a verdict of $450 against the defendant. The trial judge had instructed the jury as follows: "Here I understand the surgeon was called in the usual way; nothing said about the time during which he was to attend, and he went in obedience to that call. If nothing more were said or done, the law would require him to give such attention as the case required."

Commenting on this charge, the court says: "In many cases, from certain admitted facts, the law will infer a definite contract, implied perhaps, but none the less certain and distinct. Much more will it infer certain elements as belonging to particular contracts, or impose specific duties in connection with and growing out of special undertakings. Especially is this true of all of that class of cases in which the contract grows out of an employment, in a greater or less degree public in its nature. All professional business partakes somewhat of this character. The care and skill which a professional man guarantees to his employer are elements of the contract to which he becomes a party on accepting a proffered engagement. They are implied by the law as resulting from that engagement, though it be but verbal, and nothing said in relation to such elements. So continued attention to the undertaking, so long as attention is required, in the absence of any stipulation to the contrary, is equally an inference of the law.

"If a counselor at law undertakes the management of a cause, nothing more being said or done than simply an offer and acceptance of a retainer for that purpose, it will hardly be denied that an abandonment of the cause before its close would be as much a violation of the contract with the client as a neglect to use the requisite care and skill in its prosecution, and the duty of continued attention is equally an implication of the law as that of exercising the required care and

skill. That the same principles apply to the employment of a physician or surgeon, there can be no doubt. If he is called to attend in the usual manner, and undertakes to do so by word or act, nothing being said or done to modify this undertaking, it is quite clear, as a legal proposition, that not only reasonable care and skill should be exercised, but also continued attention as long as the condition of the patient might require it, in the exercise of an honest and properly educated judgment; and certainly any culpable negligence in this respect would render him liable in an action."; citing Shearman and Redfield on Negligence, sec. 441.

In *Bradley* v. *Dodge*, 45 How. Pr. 57, the defendant called at the office of the plaintiff, a physician, and not finding him, wrote on his business card, "Call on Mrs. D——, at No. 769 Broadway," left the card with a clerk in the office, with directions to hand to the physician, and to tell him to come as soon as possible. The physician called on Mrs. D—— several times professionally, and performed services to the value of ninety-eight dollars. And it was held that the defendant was liable to pay the bill.

In *Potter* v. *Virgil*, 67 Barb. 578, the head-note is: "When a physician is employed to attend upon a sick person, his employment continues while the sickness lasts; and the relation of physician and patient continues, unless it is put at end to by the assent of the parties, or is revoked by the express dismissal of the physician."

Putnam certainly knew that the plaintiffs were continuing their attentions to the wounded man under the original employment. And if he did not expect to be held for the value of those services beyond the first visit, good faith required him to give notice to that effect. A physician and his employer may make such contract as they see fit, limiting the attendance to a longer or shorter period, or to a single visit, and the law will enforce the contract they have made. But if there be no such limitation, and the physician is called in generally, the presumption is, that his services are rendered under an implied engagement to attend the patient through that illness, or until his services are dispensed with. We perceive no distinction between Putnam's liability for the first and any subsequent visit.

The judgment in favor of the lumber company is affirmed, and as to the other defendant, it is reversed and a new trial is ordered.

AGENT EXCEEDING HIS AUTHORITY, WHEN BINDS HIMSELF: See *Baldwin* v. *Leonard*, 94 Am. Dec. 324, note 326; *McCurdy* v. *Rogers*, 91 Id. 468, note 471; *Hall* v. *Crandall*, 89 Id. 64, note 69; *Sanborn* v. *Neal*, 77 Id. 502, note 507, where others cases in that series are collected.

PHYSICAN CALLED TO ATTEND PATIENT IS BOUND TO GIVE CONTINUED ATTENTION: See note to *Howard* v. *Grover*, 48 Am. Dec. 481; *McClallen* v. *Adams*, 31 Id. 140.

LIABILITY OF PATIENT FOR SERVICES OF CONSULTING PHYSICIAN: See *Garrey* v. *Stadler*, 58 Am. Rep. 877.

CARDEN *v.* LANE.

[48 ARKANSAS, 216.]

PURCHASE BY STRANGER IN GOOD FAITH, AT EXECUTION SALE, WILL BE PROTECTED from secret infirmities, and mere inadequacy in price will not avoid such sale, unless knowledge of some vice in the sale or some misconduct or wrongful act on the part of the purchaser be shown.

SUIT to set aside an execution sale. The opinion states the case.

Z. P. H. Farr, for the appellant.

By Court, COCKRILL, C. J. A saw-mill and fixtures belonging to the appellant, and worth between four hundred and five hundred dollars, were sold by the sheriff under an execution against him to the appellee for fifty dollars. About two months after the sale, and after an ineffectual effort to repurchase the property, the appellant filed his complaint in equity, against the purchaser and the plaintiff in the execution, to set aside the sale. He relies for the purpose upon the inadequacy of the price paid by the purchaser, and the fact that he was led by the attorney for the plaintiff in the execution to believe that the sale would not take place on the day advertised, but would be postponed for the purpose of submitting to his client a proposition made by the appellant to discharge the judgment upon which the execution issued, by a conveyance of real estate to the person who owned it. The proof shows that the agreement was made, and that the sale was allowed to proceed in violation of it. The appellant had no notice of the sheriff's intention to proceed with the sale until ten o'clock of the day it was made. He was then about three miles from the place of sale, at the storehouse of the appellee, and was then informed that the latter had gone to the mill for the purpose of buying it under the execution. It was the day originally advertised for the sale. The sheriff had his instructions

from the attorney controlling the execution, to sell; the appellant had given him no positive information of the agreement not to do so, and the appellee was not apprised of the proposition to compromise, or of the agreement to postpone the sale. He was absent from the county when the arrangement was made for postponement, and returned only the night before the sale. After receiving the information that the appellee had gone to attend the sale and bid for his property, the appellant made no effort to reach the place of sale and inform him and others who might intend to bid of the breach of faith on the part of the attorney who controlled the execution. He might readily have done this, for the proof shows that the sale did not take place until twelve o'clock,— about the usual hour for such sales. Notice to the bidder before the sale, of the agreement to postpone, would have prevented the sale, or else have rendered the purchase invalid. The owner thus had it easily in his own hands to prevent the sacrifice of his property, but he seems to have preferred to await the result of the sale and seek his opportunity to repurchase. His equities, under the circumstances, cannot be said to be superior to the purchaser's.

It is the policy of this court, settled by a line of precedents, that a purchase in good faith by a stranger, at an execution sale, shall be protected from secret infirmities: *Adams* v. *Cummings*, 10 Ark. 541; *Whiting* v. *Beebe*, 12 Id. 422; *Byers* v. *McDonald*, 12 Id. 218; *Newton's Heirs* v. *State Bank*, 22 Id. 19; *Files* v. *Harbison*, 29 Id. 307; *Youngblood* v. *Cunningham*, 38 Id. 571; *Huffman* v. *Gaines*, MS.

To avoid his purchase, even where the price paid is inadequate, knowledge of the vice in the sale, or some misconduct or wrongful act traceable to him, must be shown. The courts often seize upon a slight circumstance to add to the weight of the inadequacy of price to turn the scale, but it must be shown that the purchaser is in some measure responsible for it: Cases *supra; Hudgens* v. *Morrow*, 47 Ark. 515; *Adams* v. *Thomas*, 44 Id. 267; *White* v. *Wilson*, 14 Ves. Jr. 151; *Graffam* v. *Burgess*, 117 U. S. 180; Freeman on Executions, sec. 343.

In the case of *Newton's Heirs* v. *State Bank*, *supra*, the effort to set aside an execution sale because there was no notice given of the sale, and the price realized was grossly inadequate, proved ineffectual, because, as the court found, the purchaser had nothing to do with bringing about the improper sale, and was ignorant of the infirmity.

The facts in *Williams* v. *Doran*, 23 N. J. Eq. 385, closely re-

semble those here presented. The attorney for the plaintiff in the execution had agreeed that the sale should be postponed, but the sale proceeded and the defendant's property was purchased by a stranger at half its actual value; but the defendant's surprise not having been generated by the purchaser, and the fact of the intended postponement being unknown to him, the sale was allowed stand.

The purchaser alone resists the effort to open the sale. He and the sheriff were without fault, and the decree must be affirmed.

INADEQUACY OF PRICE, EFFECT OF ON EXECUTION SALE: See *Campau* v. *Godfrey*, 100 Am. Dec. 133, note 146, where other cases in that series are collected.

BONA FIDE PURCHASER AT EXECUTION SALE, HOW FAR PROTECTED: See *Ayres* v. *Duprey*, 86 Am. Dec. 651, note 668, where other cases in that series are collected.

LITTLE ROCK, MISSISSIPPI RIVER, AND TEXAS RAILWAY COMPANY *v.* LEVERETT.

[48 ARKANSAS, 333.]

STATEMENTS OF DECEASED AS TO CAUSE AND MANNER OF INJURY, MADE BY HIM IMMEDIATELY after being run over by a railroad car, and while he was still under the car, are admissible in evidence as part of the *res gestæ* in an action against the company for negligence resulting in the death of the person injured.

EVIDENCE OF POVERTY OF MOTHER, AND OF HER DEPENDENCE ON HER DECEASED SON for support and maintenance, is admissible in evidence to show the pecuniary damage suffered by her by his death, in an action brought by her under the statute, as next of kin of the deceased.

EMPLOYER ASSUMES DUTY OF EXERCISING REASONABLE CARE AND PRUDENCE in providing his employee a safe place and tools, in and with which to exercise his employment, and to maintain the place and tools in a reasonably safe condition; and if injury results from the employer's neglect to furnish a safe place and tools, he will be liable therefor, unless the employee, at and before the time he was injured, had full knowledge of the defects in the place or tools in or with which he was required to work.

SERVANT IS NOT BOUND TO SEARCH FOR LATENT DEFECTS IN APPLIANCES of the business in which he is employed, but is only required to take notice of such defects and hazards as are obvious to the senses. He has a right to rely upon the judgment and discretion of his master, and to assume that he will fully perform his duty toward him.

EMPLOYEE IS NOT BOUND BY RULE OF RAILWAY COMPANY NOT BROUGHT TO HIS ATTENTION, or which is habitually violated with the knowledge of his superior officers, and without any effort on their part to enforce it, or where the usage and practice of the company would tend to mislead him in the violation of the rule.

CONTRIBUTORY NEGLIGENCE IS MATTER OF DEFENSE, which cannot be presumed, but must be proved, and the burden of proving it rests on the defendant.

ACTION for injuries causing death. The opinion states the case.

J. M. Moore, for the appellant.

X. J. Pindall and B. F. Grace, for the appellee.

By Court, BATTLE, J. This was an action brought by Sallie L. Leverett, as administratrix of the estate of James W. Leverett, deceased, against the Little Rock, Mississippi River, and Texas Railway Company, to recover damages alleged to have resulted from the negligence of the defendant in wrongfully causing the death of the deceased. The action was brought under section 5226 of Mansfield's Digest, to recover damages for the benefit of the next of kin of the deceased.

The negligence averred is, that defendant's road-bed, tracks, and station at the town of Arkansas City were constructed on a high embankment, with a narrow and insufficient crown, and steep, slippery, and insufficient slopes; that the cross-ties placed on the embankment extended over the sides of the embankment; that there was no walk-way for switchmen to walk or stand upon when in the necessary discharge of their duties in coupling and uncoupling cars; and that the road-bed at this place was not sufficiently ballasted or surfaced up. It is averred that the deceased was employed by defendant as a switchman in the yard at this station, and was engaged on the night of the 12th of January, 1883, in the line of his duty, in uncoupling cars, and that while so engaged one of his feet slipped between the ties and was caught, and before he could extricate it he was run over by defendant's cars and killed; that the deceased had then been recently employed by defendant, and was ignorant of the dangerous and defective construction of the embankment, road-bed, and tracks on which he was engaged at the time he was killed, and that his death was the result of the negligence of defendant in constructing its road-bed and tracks in the manner stated.

On a trial in the circuit court, plaintiff recovered a judgment for three thousand five hundred dollars, and defendant appealed to this court.

It is first insisted that the circuit court erred in admitting evidence of the declarations of the deceased as to the manner in which he was injured. Thomas Leverett, a brother of the

deceased, testified that he heard a noise on the railroad, and immediately went over and found the deceased under the car, lying partly on the rails, between the track, trying to get out, but could not do so, being unable to move his legs; and he asked him how he was caught, and that deceased told him he had stepped in between the cars to uncouple them; that the pin was tight, and he stepped out and signaled the engineer to back up to loosen the pin, and that he then stepped in between the cars to uncouple them, and as he did so he stepped between the ties and his feet slipped, and before he could recover, his foot was caught against the tie by the break-beam and he was thrown down. This statement was made by the deceased while he was under the car and in the condition found by his brother.

Appellant insists that this statement was incompetent evidence, because it was not a part of the *res gestæ*.

Wharton says: "The *res gestæ* may be defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone as well as things done. Their sole distinguishing feature is, that they should be the necessary incidents of the litigated act,—necessary, in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate casual relation to the act,—a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. . . . . Therefore, declarations which are the immediate accompaniments of an act are admissible as a part of the *res gestæ;* remembering that immediateness is tested by closeness, not of time, but by casual relation as just explained": Wharton on Evidence, secs. 258, 267, and authorities cited.

In *Clinton* v. *Estes*, 20 Ark. 225, it said: "It may be difficult to determine at all times when declarations shall be received as a part of the *res gestæ*. But when they explain and illustrate it, they are clearly admissible. Mere narratives of past

events, having no necessary connection with the act done, would not tend to explain it. But the declaration may properly refer to a past event as the true reason of the present conduct."

In *Carr* v. *State*, 43 Ark. 102, in speaking of what declarations constitute a part of the *res gestæ*, the court said: "Nor need any such declarations be strictly coincident as to time, if they are generated by an excited feeling which extends without break or let down from the moment of the event they illustrate. But they must stand in immediate casual relation to the act, and become part, either of the action immediately preceding it, or of the action which it immediately precedes." Again, in *Flynn* v. *State*, 43 Ark. 292, it is said: "It often becomes difficult to determine when declarations shall be received as part of the *res gestæ*. In cases like this, words uttered during the continuance of the main action, or so soon thereafter as to preclude the hypothesis of concoction or premeditation, whether by the active or passive party, become a part of the transaction itself, and if they are relevant, may be proved as any other fact, without calling the party who uttered them."

In *Commonwealth* v. *Hackett*, 2 Allen, 136, upon a trial for murder, a witness testified that at the moment the fatal stabs were given he heard the victim cry out: "I am stabbed"; and he at once went to him and reached him within twenty seconds after that, and then heard him say: "I am stabbed—I am gone—Dave Hackett has stabbed me." This evidence was held competent as a part of the *res gestæ*. Chief Justice Bigelow, for the court, said: "If it was a narrative statement, wholly unconnected with any transaction or principal fact, it would be clearly inadmissible. But such was not its character. It was uttered immediately after the alleged homicidal act, in the hearing of a person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and who went to him after so brief an interval of time that the declaration or exclamation of the deceased may fairly be deemed a part of the same sentence as that which followed instantly after the stab with the knife was inflicted. It was not, therefore, an abstract or narrative statement of a past occurrence, depending for its force and effect solely on the credit of the deceased, unsupported by any principal fact, and receiving no credit or significance from the accompanying circumstances. But it was an exclamation or statement con-

temporary with the main transaction, forming a natural and material part of it, and competent as being original evidence in the nature of *res gestæ*." Again the learned judge said: "The true test of the competency of the evidence is not, as was argued by the counsel for the defendants, that the declaration was made after the act was done, and in the absence of the defendant. These are important circumstances, and . . . . if they stood alone, quite decisive. But they are outweighed by the other facts in proof, from which it appears that they were uttered after the lapse of so brief an interval, and in such connection with the principal transaction as to form a legitimate part of it, and to receive credit and support as one of the circumstances which accompanies and illustrates the main fact, which was the subject of inquiry before the jury."

In the case of *Hanover R. R. Co.* v. *Coyle*, 55 Pa. St. 402, where a peddler's wagon was struck, and the peddler injured by the negligence of the engineer, the latter's declaration, made after the infliction of the injury, was admitted as a part of the transaction itself, the court saying: "We cannot say that the declaration was no part of the *res gestæ*. It was made at the time in view of the goods strewn along the road by the breaking up of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations, made upon the spot at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the very transaction itself."

In the case of *Elkins* v. *McKean*, 79 Pa. St. 493, the plaintiff sued the defendant for damages caused by oil, manufactured and sold by him to plaintiff's husband, exploding while the husband was using it in a lamp, and catching fire and burning the husband to death. The court held what the husband said as to the cause of the accident, when found enveloped in the flames, or within a few minutes afterwards, was clearly competent evidence as a part of the *res gestæ*.

In *Casey* v. *N. Y. C. & H. R. R. Co.*, 78 N. Y. 518, the plaintiff sued for damages resulting from the death of a child who had been run over and killed by the defendant's cars. On the trial, a police-officer, who went to the place of the accident immediately after the child was killed, and found the child under the wheels of the car, was permitted, as a witness

for the plaintiff, to state what the engineer in charge of the engine said and did in extricating the body of the child from under the wheels of the car. The court held, the statements of the engineer were admissible as a part of the *res gestæ: Waldele* v. *N. Y. C. & H. R. R. Co.*, 95 N. Y. 284.

McLeod v. *Ginthers*, 80 Ky. 399, was a suit for damages resulting from the willful neglect of appellant's servants in sending dispatches to two conductors of trains which were to run on the same day over the same part of defendant's road. The dispatches were alike and ambiguous, and construed differently by the two conductors. The result was a collision of trains, and the death of Ginther, plaintiff's intestate, who was an engineer on one of the trains. Fish, the conductor on the same train, within a few seconds after the casualty, remarked to the engineer of the other train: "I had until 10:10 to make Beards." It was held by the court that it was important to show what Fish and Ginther thought of the meaning of the dispatch while they were acting under it, as the negligence in this case consisted of the wording of the dispatch so as to mislead them, and that the declaration of Fish, having been made within a few seconds after the accident, in view of the wrecked trains and amidst the search for persons whose fate was then unknown, and while Ginther who lived but thirty minutes was dying from the injuries he had received, was admissible for that purpose as a part of the *res gestæ*. The court said: "He had no time to contrive or devise a falsehood by which to exonerate himself from blame, and his declaration was so connected with the circumstances then surrounding him, and which form a part of this case, as to give it importance in determining the fact that he and the engineer had run the engine in the honest belief that they had until ten minutes after ten o'clock to reach Beards station. . . . . If we ignore the credit to which Fish may have been entitled as a truthful man, his declaration made under the circumstances impresses the mind with confidence in its truth, and is entitled to be given its weight as any other fact going to make up the transaction."

The statement of Leverett was made immediately after he was run over, and while the wrong complained of was incomplete, he being still under the car, and was a part of the *res gestæ*, and fairly go to explain the cause of the condition in which he was at the time it was made. It was an emanation of the act in question, and so connected with the cause of

his injuries as to preclude any idea that it was the product of calculated policy. Aside from any credit due Leverett for veracity, the circumstances immediately preceding and connected with his statement impress the mind with confidence in its truth. It was competent evidence.

It is next urged that the trial court erred in admitting evidence as to the dependence of plaintiff, Sallie L. Leverett, on the deceased for maintenance and support. The proof was, the deceased was her son; that he was about twenty-three years old at the time he was killed; and that he had never been married, and that he left a mother, brothers, and a sister, but no father, surviving him.

The evidence objected to was, that plaintiff was poor, and deceased lived with and supported her; and that she was dependent on him for support and maintenance. This evidence was admitted by the court over the objection of defendant.

In actions of this character, the statute says: "The jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person." Under the statute, the plaintiff, being next of kin of the deceased, had a right to show the pecuniary damage suffered by her by reason of his death. The effect and object of the evidence objected to was to show she had suffered a pecuniary damage by the death of her son, and for that purpose it was admissible: *Ewen* v. *Chicago etc. R'y Co.*, 38 Wis. 622; *Barley* v. *Chicago etc. R. R. Co.*, 4 Biss. 434; *Cook* v. *Clay Street Hill R. R. Co.*, 60 Cal. 609; *Opsahl* v. *Judd*, 30 Minn. 126.

In instructing the jury, the court told them, if they found for the plaintiff, they should assess her damages at whatever sum they believed would compensate her for the pecuniary loss she had sustained; and that the law prescribes no rule for the measurement of damages, except that the jury should give such damages as they should deem a fair and just compensation with reference to the pecuniary injuries resulting from the death of plaintiff's intestate to his next of kin. The damages allowed by the jury were reasonable, and it does not appear that appellant was prejudiced, or could have been prejudiced, by the evidence objected to under the instructions of the court.

It is contended by the appellant that the first, second, third,

and eighth instructions given by the court to the jury, at the instance of the plaintiff, are erroneous. The instructions informed the jury that when appellant employed plaintiff's intestate to work as a switchman in its yards at Arkansas City, it assumed a duty to him to construct and maintain its road-bed and tracks in a reasonably safe condition, so as not to unnecessarily enhance the dangers attending upon the employment; that he assumed the natural risks of his employment, but did not assume the risks arising from the negligence of the appellant in constructing a defective road-bed or track; and that if the injuries received by plaintiff's intestate were caused by the defective condition of appellant's road-bed or track, plaintiff was entitled to recover such pecuniary damages as plaintiff sustained by the death of her son, unless the injuries were the result of the contributory negligence of her intestate. In this connection, the court further instructed the jury that if plaintiff's intestate entered and continued in the employment of defendant, knowing the dangerous condition of the road-bed, plaintiff was not entitled to recover for an injury resulting from the condition of the road-bed; and that if the injury received by him occurred on account of the steep banks of the road-bed, or on account of the lack of ballasting on the track, plaintiff could not recover, if he knew this was the condition of the road-bed at and before the time of the injury; and that if at the point he was injured the road-bed was in a defective and dangerous condition, and he knew it, plaintiff could not recover for an injury occasioned by such defective road-bed.

Construing these instructions together, appellant was not prejudiced by any of them. In employing the deceased, the appellant assumed the duty of exercising reasonable care and prudence to provide him a safe place and tools to exercise the employment, and to maintain the place and tools in a reasonably safe condition during the time for which he was employed; and the deceased assumed the risks and hazards which ordinarily attend or are incident to the service he was engaged to perform. The negligence of appellant to supply a safe road-bed, or place and tools for deceased, was not a hazard and risk usually or necessarily attendant upon or incident to the performance of his contract; nor was it one which the deceased, in legal contemplation, is presumed to have assumed, for the obvious reason that he was to use such road-bed, place, and tools as were to be provided by appellant, and had and

was to have nothing to do with constructing the road-bed and place, and purchasing the tools, or with the preservation or maintenance of such road-bed and tools in suitable condition after they were supplied. This risk is not within the contract of service. If it was, appellant would have been relieved of all pecuniary responsibility for failing to perform the obligations he had assumed. Such a doctrine would be subversive of all just ideas of the obligations arising out of such contracts of service, and would withdraw all protection from such employees. A doctrine that leads to such results is contrary to reason, and unworthy the sanction of any court: *St. Louis etc. R'y Co.* v. *Higgins*, 44 Ark. 300; *Davis* v. *Central Vermont R. Co.*, 11 Am. & Eng. R. R. Cas. 175; 45 Am. Rep. 590; *Missouri Pacific R'y Co.* v. *Lyde*, 11 Am. & Eng. R. R. Cas. 190; *Texas-Mexican R'y Co.* v. *Whitmore*, 11 Id. 199; *Galveston etc. R. R.* v. *Lempe*, 11 Id. 201; *Atchison etc. R. R. Co.* v. *Holt*, 11 Id. 211; *Atchison etc. R. R. Co.* v. *Moore*, 11 Id. 247, 252; *Brown* v. *Atchison etc. R. R. Co.*, 15 Id. 271; *Elmer* v. *Locke*, 135 Mass. 575; Pierce on Railroads, 370; *Hough* v. *Railway Co.*, 100 U. S. 213.

While there was an implied contract between the appellant and the deceased that the former should furnish and provide for deceased a safe place and road-bed in and on which to perform the labors required of him, yet the failure of appellant in that regard furnished no excuse for the conduct of the deceased, if he voluntarily and knowingly incurred the risks and dangers of performing the labors of his employment on a defective and dangerous road-bed. If he had, at and before he was injured, full knowledge of the dangerous character and defects of the road-bed, or place on and in which he was required to work, he had the right to decline to work, or require that the road-bed or place should first be made safe; but if he did not, and with this knowledge entered upon the work, he assumed the risk, and should bear the consequences: *L. R. & Ft. S. R. R. Co.* v. *Duffey*, 35 Ark. 613; *Fones* v. *Phillips*, 39 Id. 36; *Gibson* v. *Erie R'y Co.*, 63 N. Y. 452; Wood on Master and Servant, secs. 335, 372; Pierce on Railroads, 379.

A servant is not required to inspect the appliances of the business in which he is employed, to see whether or not there are latent defects that render their use more than ordinarily hazardous, but is only required to take notice of such defects or hazards as are obvious to the senses. The fact that he might have known of defects, or that he had the means and

opportunity of knowing of them, will not preclude him from a recovery unless he did in fact know of them, or in the exercise of ordinary care ought to have known of them. He is not bound to make an examination to find defects. There is no such legal obligation imposed upon him. That is the duty of the master. The servant is not bound to search for dangers, except those risks that are patent to ordinary observation; he has a right to rely upon the judgment and discretion of his master, and that he will fully perform his duty toward him: *Fort Wayne, Jackson, and Saginaw R. R. Co.* v. *Gildersleeve*, 33 Mich. 133; *Hughes* v. *Winona and St. Peter R. R. Co.*, 27 Minn. 137; *Reber* v. *Tower*, 11 Mo. App. 203; Wood on Master and Servant, sec. 376, and authorities cited.

The circuit court instructed the jury that an employee is not bound by a rule of the company not brought to his attention, or which is habitually violated with the knowledge of his superior officers, and without any effort on their part to enforce it, or where the usage and practice of the company would tend to mislead him in the violation of the rule. Appellant insists that this instruction is erroneous; but we see no error in it: *Fay* v. *Minneapolis & St. L. R'y Co.*, 11 Am. & Eng. R. R. Cas. 193.

Appellant asked the court below to instruct the jury to the effect that if the defects in the road-bed where Leverett was thrown down and mortally injured by its cars were easily and readily seen, and Leverett had been accustomed to working there, and in attempting to uncouple cars while in motion received the injuries which caused his death, plaintiff was not entitled to recover. And the court refused to give the instruction. Appellant insists that the court erred in so doing.

Contributory negligence is a matter of defense. It is not presumed, but must be proved, and the burden of proving it rests on defendant: *Hough* v. *Railway Co.*, 100 U. S. 225; *Burlington, Cedar Rapids, and Northern R. R. Co.* v. *Coats*, 15 Am. & Eng. R. R. Cas. 265.

We have failed to find, and appellant has not called our attention to, any evidence which would have made the instructions asked for by it, and refused by the court, applicable or appropriate. There was no evidence, so far as we have discovered, to prove that the deceased, before he was hurt, knew or ought to have known of the condition of the track where he was fatally injured. There was evidence tending to prove that he was employed to work, and had been working, in a

part of appellant's yard at Arkansas City, where the tracks and yard were in a good condition. The first time we have any evidence of his working on the road where he was killed, or his having been there, was the night and time he was killed. It was then dark, cloudy, and had been raining. He was called to fill the place of an absent employee, and while attempting to uncouple a car, at half-past four o'clock in the morning, was run over by the cars, and so injured that he died within two or three days thereafter.

The evidence does not show that the defects which led to his injury were patent to ordinary observation, at the time and under the circumstances he was hurt, it being in the night and dark and cloudy; and we do not feel at liberty to indulge in the presumption that they were: *Brown* v. *Atchison etc. R. R. Co.*, *supra*. We find no error in the proceedings of the court below prejudicial to appellant. And the judgment is affirmed.

DUTY OF MASTER TO FURNISH SAFE MACHINERY AND PROPER PLACE FOR SERVANT: See *Wormell* v. *Maine C. R. R. Co.*, 1 Am. St. Rep. 321, note 330, where other cases are collected; *Smith* v. *Peninsular Car Works*, 1 Id. 542.

DUTY OF MASTER TO POINT OUT LATENT RISKS TO SERVANT: See *Smith* v. *Peninsular Car Works*, 1 Am. St. Rep. 542, note 548, where other cases are collected.

EMPLOYEE OF RAILROAD COMPANY MAY ASSUME THAT CAR DELIVERED TO HIM FOR USE IS SAFE: *Bushby* v. *New York etc. R. R. Co.*, 1 Am. St. Rep. 844.

DECLARATIONS OF PERSON INJURED, WHEN ADMISSIBLE AS PART OF RES GESTÆ, AND WHEN NOT: See *Roche* v. *Brooklyn etc. R. R. Co.*, 59 Am. Rep. 506; *Merkle* v. *Township of Bennington*, 55 Id. 666; *Cleveland etc. R. R. Co.* v. *Newell*, 54 Id. 312; *Sullivan* v. *Oregon R. & N. Co.*, 53 Id. 364; *Augusta Factory* v. *Barnes*, 53 Id. 838; *City of Galveston* v. *Barbour*, 50 Id. 519; *Waldele* v. *New York etc. R. R. Co.*, 47 Id. 41, note 52; *Mutcha* v. *Pierce*, 35 Id. 776; *Fay* v. *Harlan*, 35 Id. 372; *Quaife* v. *Chicago etc. R'y Co.*, 33 Id. 821, note 828; note to *People* v. *Vernon*, 95 Am. Dec. 66; *Baker* v. *Kelly*, 93 Am. Dec. 274, note 279, where other cases in that series are collected; *Illinois Central R. R. Co.* v. *Sutton*, 92 Id. 81, note 84; *Matteson* v. *New York Central R. R. Co.*, 91 Id. 67, note 72.

CONTRIBITORY NEGLIGENCE, WHETHER MATTER OF DEFENSE: See *Burns* v. *Chicago etc. R'y Co.*, 58 Am. Rep. 227, note 229; *Gaynor* v. *Old Colony etc. R'y Co.*, 97 Am. Dec. 96.

TABOR v. MERCHANTS' NATIONAL BANK.

[48 ARKANSAS, 454.]

DEFENDANT, BY PLEADING OVER AFTER DEMURRER OVERRULED, WAIVES ALL OBJECTIONS to the ruling of the court on the demurrer.

PROOF THAT ASSIGNMENT OF NOTE WAS MADE BEFORE ITS MATURITY will overcome the statutory rule that an assignment without date shall be taken to have been made at a date most to the advantage of the defendant.

PRODUCTION OF NOTE AND PROOF THAT INDORSEMENT WAS MADE BEFORE MATURITY RAISES PRESUMPTION that the holder paid value for it, was an innocent holder, and acquired it in due course of business; but the presumption of the payment of value is overcome by proof that the note, in its inception, was so infected with fraud as to destroy the title of the original holder, and the burden of proof that value was given for it is then shifted to the plaintiff.

SURETY WHO SIGNS NEGOTIABLE NOTE WITH AGREEMENT THAT IT IS NOT TO BE DELIVERED to the payee until it is signed by other sureties cannot, as against an innocent payee without notice, set up the fraud of the maker in delivering it without the signatures of the additional sureties. He is regarded as having constituted the maker his agent to negotiate the note, and having clothed him with the means of perpetrating the fraud, he must bear the loss.

ONE WHO TAKES NEGOTIABLE PAPER IN PAYMENT OF ANTECEDENT DEBT, before maturity, and without notice of any defect therein, receives it in due course of business, and becomes a holder for value, entitled to enforce payment without regard to the defenses that may exist between other parties to the paper.

ACTION on a note. The opinion states the case.

Collins and Balch, for the appellants.

By Court, COCKRILL, C. J. The Merchants' National Bank sued the appellees upon a note signed by them and one Jerre Wolf, who was not sued. The note was made payable to the order of the German Insurance Company of Freeport, Illinois, and was indorsed in blank.

The appellants filed an answer, in which it was alleged that they signed the note "as sureties for Wolf in payment of an antecedent indebtedness then owing by said Wolf to the German Insurance Company," upon the express agreement that Wolf should not deliver the note to the payee until W. L. Taylor and Alvie Smith had signed it with them, but that in violation of the agreement Wolf delivered the note to the payee, and that the bank knew the facts when the note was indorsed to it, and denied that the indorsement was made before maturity.

A jury was waived, and the court made the following finding of facts, viz.: —

1. That the note sued on was signed by E. A. Tabor, Jesse Turner, Jr., and O. P. Brown, at the instance and request of Jerre Wolf, one of the makers, with the understanding and agreement that the same was not to be delivered to the German Insurance Company, to which the said Wolf was indebted, until W. L. Taylor and Alvie Smith should sign it as sureties with them; that said note was delivered to the German Insurance Company without the signatures of Taylor and Smith; and that the insurance company had no knowledge of the manner in which the signatures of the above-named parties had been obtained.

2. That the said note was assigned to the plaintiff before maturity in regular course of business, and judgment was entered for the plaintiff.

The appellants contend that the finding is not sustained by the evidence, in so far as it relates to the insurance company's want of knowledge of the condition upon which the appellants' signatures were obtained by Wolf. As to that point, it is only necessary to say that no testimony was offered by either side. It is argued, however, that the facts found are not sufficient to sustain the judgment.

The contention is, that the proof that the note was put in circulation by Wolf, in violation of the agreement with the appellants, cast upon the plaintiff the *onus* of proving, not only that the note had been indorsed to it before maturity, but also that it was acquired upon a valuable consideration. There was no proof of the consideration paid by the plaintiff.

The fact of indorsement by the insurance company to the plaintiff was not put in issue, as counsel seem to suppose. The complaint alleged that the indorsement was made before maturity for a valuable consideration, and the answer avers that the note "was not assigned to the plaintiff before maturity, but in truth and in fact that the assignment was made long after maturity, and that the assignment was not made for a valuable consideration." The defendants had previously undertaken to test the sufficiency of the indorsement by demurrer, but the demurrer was overruled, and by pleading over to the merits they waived all objection to the ruling of the court in that respect (*Chapline* v. *Robertson*, 44 Ark. 202, *Jones* v. *Terry*, 43 Id. 230), and did not renew the objection in any other form.

The answer, so far from containing a denial of the assignment (see Mansfield's Digest, sec. 477), is an admission of its

validity, and when the plaintiff proved, as was done, that the assignment was, in fact, made before the maturity of the instrument, the statutory rule that a blank assignment shall be taken to have been made at a date most to the advantage of the defendant was overcome: *Trader* v. *Chidester*, 41 Ark. 242.

The production of the note and proof that the indorsement was made before maturity raised the presumption that the plaintiff had paid value for the note; that it was an innocent holder, and had acquired it in due course of business; but if the proof subsequently offered by the defendants to establish their defense shows that the note in its inception was so infected by fraud as to destroy the title of the original holder, the presumption of the payment of value was thereby overcome, and the burden of proof was shifted to the plaintiff to show that value was given for the note: 1 Daniel on Negotiable Instruments, sec. 814; Benjamin's Chalmer's Digest, p. 109, art. 97; 2 Greenl. Ev., sec. 172; *Commissioners* v. *Clarke*, 94 U. S. 277, 285; *Collins* v. *Gilbert*, 94 Id. 753; *Nickerson* v. *Roger*, 76 N. Y. 279; *National Bank* v. *Green*, 43 Id. 298; *Kellogg* v. *Curtis*, 69 Me. 212; *Gray's Adm'r* v. *Bank*, 29 Pa. St. 365.

The reason assigned for this rule is, that "where there is fraud the presumption is that he who is guilty will part with the note for the purpose of enabling some third party to recover upon it, and such presumption operates against the holder, and it devolves upon him to show that he gave value for it": *Bailey* v. *Bidwall*, 13 Mees. & W. 73; *Collins* v. *Gilbert*, *supra*.

If, therefore, the evidence shows that the note was invalid in the hands of the insurance company, by reason of the fraud practiced upon the appellants by their principal, Wolf, then the plaintiff, who is the indorsee, having failed to rebut the presumption of invalidity that is raised against it, was not entitled to recover.

But when we come to the consideration of that question, we find no allegation in the answer, and there is no proof to show that the insurance company had notice of the condition upon which the appellants had signed the note. It was complete in form; there was nothing on its face to arouse suspicion, and the answer alleges that it was given in payment of a debt due from Wolf to the insurance company. The inquiry is, therefore, Was the insurance company, under these circumstances, affected by the fraud practiced by Wolf upon his sureties?

It was ruled by this court at the present term that the delivery of an official bond by a surety to the principal obligor, upon the condition that it should not be delivered until signed by other parties, did not have the effect of constituting it an escrow as when delivered under like circumstances to a stranger: *State* v. *Churchill*, 48 Ark. 426. While there is some conflict in the authorities upon this point as to non-negotiable instruments, we are aware of no case which holds that such an effect is given where a negotiable instrument, perfect in form, is delivered to the maker. In such cases, where the question arises between the injured party to the note and a payee who has taken it for value, without notice of the condition, the former, having executed it and intrusted it to a maker, is regarded as having constituted him his agent to negotiate it; and having clothed him with the means of perpetrating the fraud, must bear the loss: *Passumpsic Bank* v. *Goss*, 31 Vt. 315; *F. & M. Bank* v. *Humphrey*, 36 Id. 354; *Ayres* v. *Milroy*, 53 Mo. 516; 14 Am. Rep. 465; *Bank* v. *Phillips*, 17 Mo. 29; *Smith* v. *Moberly*, 10 B. Mon. 266; *Merriam* v. *Rockwood*, 47 N. H. 81; *Gage* v. *Sharp*, 24 Iowa, 15; *Daniels* v. *Gower*, 54 Id. 319; *Graff* v. *Logue*, 61 Id. 704; *Deardorff* v. *Foresman*, 24 Ind. 481; *Clark* v. *Bryce*, 64 Ga. 486; *Stoddard* v. *Kimball*, 6 Cush. 469; *Clark* v. *Thayer*, 105 Mass. 216; 7 Am. Rep. 511; 1 Daniel on Negotiable Instruments, sec. 854.

The insurance company had the right, then, to assume that the appellants had authorized Wolf to deliver the note to it for them; and as it is not shown that the company had notice of the violated condition, or any reason to suspect its existence, the appellants have failed to connect it with the fraud, or to establish a *prima facie* case against it, if value was paid by it for the note: Cases *supra*.

In the case of *Bertrand* v. *Barkman*, 13 Ark. 150, it was ruled that one who takes negotiable paper in payment of an antecedent debt, before maturity and without notice, actual or otherwise, of any defect thereto, receives it in due course of business, and becomes, within the meaning of the commercial law, a holder for value, entitled to enforce payment without regard to the defenses that may exist between the other parties to the paper; and this is in accord with the very general concurrence of judicial authority: 1 Daniel on Negotiable Instruments, sec. 832; *Harrell* v. *Tenant*, 30 Ark. 684; *Railroad* v. *National Bank*, 102 U. S. 14; *Oates* v. *National Bank*, 100 Id. 239; *Stoddard* v. *Kimball*, 6 Cush. 469; *Bank* v. *Phillips*, 17 Mo. 29.

It follows, then, that the appellants having failed to establish the invalidity of the note in the hands of the first holder, the necessity of proving the payment of value for the indorsement was not cast upon the bank, and it was entitled to recover.

BONA FIDE PURCHASER OF NEGOTIABLE PAPER TAKES VALID TITLE, although its execution was procured by fraud: *First National Bank of Parkersburg* v. *Johns*, 46 Am. Rep. 506; *Millard* v. *Barton*, 43 Id. 51; *Phelan* v. *Moss*, 5 Id. 402; *Douglas* v. *Matting*, 4 Id. 238; *Park Bank* v. *Watson*, 1 Id. 573; *Doll* v. *Rissotti*, 96 Am. Dec. 399, note 403, where other cases in that series are collected.

ONE WHO TAKES NEGOTIABLE INSTRUMENT IN GOOD FAITH, BEFORE MATURITY, FOR ANTECEDENT DEBT, WHETHER HOLDS IT FREE FROM EQUITIES: See *Mix* v. *National Bank of Bloomington*, 33 Am. Rep. 44, note 46, where this subject is discussed, and the cases on both sides of the question are collected; *Kellogg* v. *Fancher*, 99 Am. Dec. 96, note 102, where other cases in that series are collected.

POSSESSION OF PROMISSORY NOTE IS PRIMA FACIE EVIDENCE OF BONA FIDE HOLDING, but if there is evidence of fraud in its inception, the burden is on the indorsee to show that he took it without notice of the fraud: *Kellogg* v. *Curtis*, 31 Am. Rep. 273; *Lake* v. *Reed*, 4 Id. 209; *Atlas Bank* v. *Doyle*, 98 Am. Dec. 368, note 369, where other cases in that series are collected.

LITTLE ROCK AND FORT SMITH R'Y CO. *v.* EUBANKS.

[48 ARKANSAS, 460.]

CONTRACT BY WHICH EMPLOYEE ENGAGED IN OPERATING DANGEROUS MACHINERY AGREES IN ADVANCE TO WAIVE the duties and liabilities which the employer owes him to furnish a reasonably safe place in which, and suitable tools and appliances with which, to do his work, is against public policy, and void.

EVIDENCE OF DEFECT IN RAILROAD TRACK MUST BE CONFINED TO TIME OF CASUALTY, of which it is alleged to have been the cause, or to proof of such a state of facts, so shortly before or after it, as will induce a reasonable presumption that the condition was unchanged. The jury cannot, without proof, infer the existence of the defect.

RAILWAY COMPANY DOES NOT WARRANT TO ITS SERVANTS SAFE CONDITION of its line and machinery; it guarantees only that due care shall be used in constructing, keeping in repair, and operating its line, appliances, and machinery.

CONTRIBUTORY NEGLIGENCE, AS DEFENSE, MUST BE AFFIRMATIVELY PROVED.

RAILROAD EMPLOYEE CANNOT RECOVER FOR INJURY CAUSED BY DEFECTS COMMON TO RAILROADS, and such as could not have been avoided by the exercise of reasonable care and attention on the part of the company.

ACTION to recover for injuries causing death. The opinion states the case.

J. M. Moore, for the appellant.

Thomas B. Martin and Ed. H. Mathes, for the appellee.

By Court, SMITH, J. Appellee, as administratrix of J. C. Eubanks, sued appellant in the Franklin circuit court, alleging that she was the mother of the deceased, and administratrix, etc.; that on the seventh day of October, 1884, her intestate was employed under a contract as brakeman on appellant's railway; and that on or before that time appellant's railway, at the town of Ozark, was in a defective condition, in this: "The defendant had constructed on its said road, and as a part of it on the track thereof at said place, a switch, and a frog, which was so worn, ill-constructed, and defective as to render it unsafe and unfit for use." The complaint alleges knowledge by appellant of these defects, and that by reason thereof, and the unsafe condition of the road at that point, and appellant's negligence, her intestate, while in the performance of his duty as brakeman under his contract, was thrown from the car, run over, and killed.

The answer denies that the switch or frog was defective, ill-constructed, or unfit for use, or that plaintiff's intestate was thrown from the car and killed by reason of any such defects; denies that the deceased was free from negligence, and alleges that his death was caused by negligence on his part. The answer also sets up and relies upon the following contract, executed by the deceased before his employment by the defendant, as a release of liability.

"Clinton Eubanks, having been employed, at his request, by the Little Rock and Fort Smith Railway in the capacity of brakeman, hereby agrees with said railway, in consideration of such employment, that he will take upon himself all risks incident to his position on the road, and will in no case hold the company liable for any injury or damage he may sustain, in his person or otherwise, by accidents or collisions on the trains or road, or which may result from defective machinery, or carelessness or misconduct of himself or any other employee and servant of the company."

The issues were submitted to a jury, which returned a verdict for the plaintiff for $9,360; upon which judgment was entered. A motion for a new trial was subsequently overruled; and a bill of exceptions was signed, saving the points hereinafter noticed.

The execution of the contract copied above was admitted by

the plaintiff. But the court refused this prayer of the defendant: "If you find that before entering the service of defendant, deceased executed the release, a copy of which is set out in defendant's answer, you are instructed that by reason of said release plaintiff will be precluded from recovering anything in this suit, and you will find for defendant."

A common carrier, or a telegraph company, cannot, by precontract with its customers, relieve itself from liability for its own negligent acts. This, however, may be on the grounds of its public employment: *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Pennsylvania R'y Co.* v. *Butler*, 57 Pa. St. 335; *L. R., M. R., & T. R. Co.* v. *Talbot*, 39 Ark. 523; *St. L., I. M., & S. R'y* v. *Lesser*, 46 Id. 236; 1 Wharton on Contracts, sec. 438.

The validity of the contract before us is not affected by such considerations. The relation existing between the parties to it is essentially a private relation,—that, namely, of master and servant. And the question is, whether a servant employed in the operation of dangerous machinery can waive in advance the duties and liabilities which the master owes him, and which do not depend on contract, but spring out of the relation itself. Of course, if he can waive them so as to bind himself, a waiver will also bar his personal representative; for the personal representative only succeeds to the right of action which the deceased would have had but for his death.

In 1880, the English Parliament passed the "employer's liability act," the object of which was to make employers liable for injury to workmen, caused by the negligence of those having the supervision and control of them. In *Griffiths* v. *Earl of Dudley*, L. R. 9 Q. B. D. 357, it was held that a workman might contract himself and his representatives out of the benfits of this act.

An opposite conclusion has been reached by the supreme courts of Ohio and Kansas. They hold that it is not competent for a railroad company to stipulate with its employees, at the time of hiring them, and as a part of the contract, that it shall not be liable for injuries caused by the carelessness of other employees: *Lake Shore & M. L. R. R. Co.* v. *Spangler*, Sup. Ct. Ohio, 1886; *Kansas Pacific R'y Co.* v. *Peavey*, 29 Kan. 169; 44 Am. Rep. 630; 11 Am. & Eng. R. R. Cas. 260. In the notes to the last-mentioned case, as reported in the two series of reports last cited, the substance of *Griffiths* v. *Earl of Dudley*, *supra*, is set out. This, however, is not precisely the

same question we have to deal with. For the negligence of a fellow-servant is not in fact and in morals the negligence of the master, although by virtue of a statute it may be imputed to the master. It is impossible for the master always to be present and control the actions of his servants. Hence a stipulation not to be answerable for their negligence, beyond the selection of competent servants in the first instance, and the discharge of such as prove to be reckless or incompetent, might be upheld as reasonable, notwithstanding a statute might abolish the old rule of non-liability for the acts and omissions of a co-servant.

But the supreme court of Georgia have, in several cases, sustained contracts like the one before us as legal and binding upon the employee, so far as it does not waive any criminal neglect of the employer. The effect of these decisions is, that the servant of the railroad company, for instance, not only takes upon himself the incidental risks of the service, but he may, by previous contract, release the company from its duty to furnish him a safe track, safe cars, machinery, and materials, and suitable tools to work with: *Western and Atlantic R'y Co.* v. *Bishop*, 50 Ga. 465; *Western and Atlantic R'y Co.* v. *Strong*, 52 Id. 461; *Galloway* v. *Western and Atlantic R'y Co.*, 57 Id. 512.

On the other hand, in *Roesner* v. *Hermann*, 10 Biss. 486, 8 Fed. Rep. 782, a contract by a master against his own negligence was declared to be void as against public policy, Gresham, J., saying: "If there was no negligence, the defendant needed no contract to exempt him from liability; if he was negligent, the contract set out in his answer will be of no avail." Compare *Memphis etc. R. R. Co.* v. *Jones*, 2 Head, 517, where it was decided that such a contract would not protect the master against gross negligence.

It is an elementary principle in the law of contracts that *modus et conventio vincunt legem*,—the form of agreement and the convention of parties override the law. But the maxim is not of universal application. Parties are permitted, by contract, to make a law for themselves only in cases where their agreements do not violate the express provisions of any law, nor injuriously affect the interests of the public: Broom's Legal Maxims, *543; *Knettle* v. *Newcomb*, 22 N. Y. 249; 78 Am. Dec. 186.

Our constitution and laws provide that all railroads operated in this state shall be responsible for all damages to per-

sons and property done by the running of trains: Const. 1874, art. 17, sec. 12; Mansfield's Digest, sec. 5537.

This means that they shall be responsible only in cases where they have been guilty of some negligence. And it may be questionable whether it is in their power to denude themselves of such responsibility by a stipulation in advance. But we prefer to rest our decision upon the broader ground of considerations of public policy. The law requires the master to furnish his servant with a reasonably safe place to work in, and with sound and suitable tools and appliances to do his work. If he can supply an unsafe machine, or defective instruments, and then excuse himself against the consequences of his own negligence by the terms of his contract with his servant, he is enabled to evade a most salutary rule.

In the English case above cited, it is said this is not against public policy, because it does not affect all society, but only the interest of the employed. But surely the state has an interest in the lives and limbs of all its citizens. Laborers for hire constitute a numerous and meritorious class in every community. And it is for the welfare of society that their employers shall not be permitted, under the guise of enforcing contract rights, to abdicate their duties to them. The consequence would be that every railroad company, and every owner of a factory, mill, or mine, would make it a condition precedent to the employment of labor, that the laborer should release all right of action for injuries sustained in the course of the service, whether by the employer's negligence or otherwise. The natural tendency of this would be to relax the employer's carefulness in those matters of which he has the ordering and control, such as the supplying of machinery and materials, and thus increase the perils of occupations which are hazardous even when well managed. And the final outcome would be to fill the country with disabled men and paupers, whose support would become a charge upon the counties or upon public charity.

2. The next question is, whether the testimony is sufficient to support the verdict. The freight train upon which the deceased was a brakeman was bound for Fort Smith, but had stopped at Ozark station about 11 P. M., and the train-men were engaged in switching off cars from the main track to a side-track. The plaintiff's intestate was assisting in this operation, being on top of one of the cars with a lantern in his hand. The evidence does not show clearly what it was that

caused him to fall between the cars. But it is probable that he was thrown off by the jolting of the car, and that this jolting was produced by the car having left the track. The theory of the plaintiff's case was, that there was a defect in the switch, or in the frog, or in both, which caused the car to run off at that particular place.

The substance of the testimony on this point was as follows:—

J. V. Bourland, for plaintiff, testified: "It was about 11 o'clock at night when I rushed to the railroad; they were taking deceased from under the wheels; it was about twelve to fifteen feet from the frog towards the depot; he was lying across the track; could see where the border or flange of the wheel cut the rail and frog; think the car got off at the frog, and it jumped across the ties; heard trains had got off there before; knew of as many as two or three getting off there; conductor and two or three others were there; don't know how many cars were attached to engine; think both trucks of second car from rear of train were off; the wheels on one side of the car were off; don't know whether the track is in good or bad repair; about fifteen or twenty feet south of the frog is where the man was killed; I know of no cars being off there before; judge from indentations on the ties; don't know how long they had been there; judge from the scar on the frog that the car wheels ran on top of it and the track about two feet; don't know how long the scar had been there, or if it had been made by this car; am satisfied the scar I saw on the frog was made by this car running off; did not examine on the outside of ties or switch-rail to see if there were any indentations on the ties; was there next morning; saw scars on the old ties where the accident occurred; two or three days afterward these old ties were gone and new ones in; live at Ozark; was never employed on a railroad."

Henry Woollum: "Don't remember exact time of the accident; was in Argenta at the time, running as fireman on an extra; was at Ozark six or eight days before going into defendant's employ; don't know as to condition of switch at time of accident, but afterwards it was bad; shortly after the accident was yard-master of this yard, and was notified by engineers that this switch was in bad condition; notified section-foreman, whose duty it was to fix it; also told McLoud, road-master; the train-dispatcher gave notice to me two or three times to run slow over that switch; this was the train-dispatcher under

Mr. Hartman, three years ago, while I was running an engine. [Evidence of above notification of condition of track, switch, etc., objected to; objection overruled, and exception saved.] The defect in the switch was that the switch-rail was one and one half inches lower than the main track; an engine got off the track there one night, and I tried two or three times to get over and could not do so; the foreman came down and fixed it; the wheel would drop between the switch and main rail; this was two months after the accident occurred, and while I was yard-master; it would throw the train to north side of track; could throw it south; Kyle, the section-boss, fixed it; did not notice ties cut by wheels; switch-rails are between main rails of track; it was a 'split' switch; engine was hard to get over; cars would go over because so much lighter; it is the duty of road-master and section-foreman to look after track; I knew there was a defect there, but not what it was; was notified switch was defective after accident occurred; could not see any defects; I went and looked; every time engine would go off to the north side; have been in railroad business about nine years; this frog and switch are the kind usually used; I made no report of defects to officers of road; looked at track inside of fifteen days after accident; had coal cars off here while engineer; cause of engine jumping was that switch-rail was lower than main rail."

None of the remaining witnesses for the plaintiff professed to have any knowledge of the condition of the track; but two of them stated that they had seen a car off the track about the same place recently before the accident occurred.

For the defendant the following witnesses testified:—

L. Treadway: "Was conductor of the train, and handling the switch, switching cars; gave signal to back; heard jumping, and signaled to stop; went down to where car was; saw it was Eubanks under the car, and said: 'My God! How did he get over there?' Saw signal from man on top of second car from rear end to 'come back'; did not see him afterwards; he was killed eight or ten feet east of frog, and one hundred and eight or ten feet east of switch; body was under last pair of trucks of second car at the rear of train; had been handling switch thirty-five or forty minutes; it was all right and a good one; I examined car and track after the accident; both were all right; I pulled the car over the ties up to the frog to get it back on; the track at this point has been good ever since I've been on the road,—eighteen months; the car

rolled about six feet after it jumped; only one pair of trucks off; he was my rear-brakeman, and his position was rear-brakeman on train or caboose; he ought to have staid in rear of the train and caught cars as they came back; he was in the head brakeman's place, and I gave him no orders to change; brakemen were all under my orders; I did not know of the change until after his death; we passed over this track ten or fifteen times that night before the accident; car ran off because of something on the track to throw it, not on account of defective frog; the signs on the ties were made by us in trying to get the car back on track; it is the duty of the yard-master and section-boss to look after the track; McLoud and Kyle filled those positions; both competent men; there was no defect in the switch, frog, or track in any respect; am not in defendant's employ now; had three brakemen; it was necessary for some one to be on top of car with engine; I would be willing to swear point-blank that it was the body of the man that threw the car off; it is a brakeman's duty to do work anywhere on the train, when necessary; after a brakeman has been assigned to a position, he has no right to change places without orders from conductor; I gave no such orders in this case, nor knew of it until I found deceased dead."

McLoud: "Am road-master, and have charge of the track; was at place of accident the morning after it occurred; examined track, switch, and frog, and found everything all right; nothing has been done to change switch, frog, or anything else, since the accident; new switch ties were put in a day or two before injury, and were all right; trains ran over the track the day and night before the injury; nothing was the matter with the track; it is necessary for the point of the switch-rail to be a little lower than main rail, so as to slip under in order to make the switch; if a car passes the frog and gets off, it would require something to throw it off; both switch, frog, and track were in good condition at the time, and are now; if switch is being made and frog is defective, and the car leaves the track, it would go off on north side; there is a little open place between the rails at frog, and if the wheels strike the point at frog it would go through this and off the north side; Mr. Kyle is section-foreman, and a competent man."

Kyle: "Was section-foreman, and duty to keep track in good order; came down morning after accident, gauged the track and found it all right; switch, frog, and track were in

good condition; I put in tics day before the accident, surfaced, leveled, and gauged the track; all regular trains passed over day before the accident; no report was ever made to me that track was defective; about two months before the accident a king-bolt broke on a lumber-car and threw it off near the water-tank; the frog is east of switch eighty feet; I put in new ties October 8th; the accident occurred next night; put new ties from point of switch up to and five under the frog; I have done no work there since; have been railroading twenty-one years."

John Edwards: "Was a hand under Mr. Kyle; there was nothing wrong with the switch, frog, or track; they are the same to-day as then, no work having been done there since."

The evidence of Dock Smith and Charles Cole was in substance same as Edwards's.

Aside from the testimony of Woollum, there is nothing here that tends to prove the existence of the defect complained of; and Woollum's testimony, when analyzed, will be found to be vague, inconclusive, and contradictory, based largely on hearsay, and relating chiefly to times long antecedent or subsequent to the accident. He says expressly that he was not acquainted with the condition of the switch at the time of the accident. His statements as to its condition three years before the trial, and some twenty-one months before Eubanks was killed, should have been excluded. Proof of what occurred two months afterwards was also irrelevant to any issue that was before the jury, being too remote to afford any fair inference.

The evidence in such cases should be confined to the time, place, and circumstances of the injury, and negligence then and there: *Parker* v. *Portland Publishing Co.*, 69 Me. 174; *G. R. & Ind. R'y Co.* v. *Huntley*, 38 Mich. 537.

Where a defective track is alleged to be the cause of the casualty, it is often impracticable to adduce evidence of the condition of the track at the precise moment the casualty occurred. It is enough to prove such a state of facts shortly before or after as will induce a reasonable presumption that the condition is unchanged.

Woollum had not examined the track before the accident; nor can his examination afterwards be brought nearer than fifteen days. Assuming that there was no change of condition within that time, the only defect he was able to discover was that the switch-rail was a little lower than the main rail. He does not seem to be very positive that this was a defect which

could be remedied, and the evidence for the defendant shows that it is necessary for the point of the switch-rail to be lower than the main rail, so as to slip under in order to make a switch.

The evidence, then, is lacking on a material point which it was essential for the plaintiff to establish,—that the appliance was defective. It may be said this was a question for the jury. But the jury could not infer it without proof.

The duties of a railroad company to its servants in these matters are not measured by the same rule that is applied in the case of passengers. "Railways do not warrant to their servants the safe condition of their line and machinery; and they guarantee only that due care shall be used in constructing and in keeping in repair, and in operating the line, appliances, and machinery": Patterson's Railroad Accident Law, sec. 284, and cases cited; *L. R. & Ft. S. R'y Co.* v. *Duffey*, 35 Ark. 602; *St. L., I. M., & S. R'y* v. *Harper*, 44 Id. 529; *St. L., I. M., & S. R'y* v. *Morgart*, 45 Id. 318; *Probst* v. *Delamater*, 100 N. Y. 266.

So far as appears, the deceased lost his life by a casualty, which, in the absence of evidence showing that the defendant was in fault, must be ascribed to the ordinary risks incident to his employment: *Little Rock etc. R'y Co.* v. *Townsend*, 41 Ark. 382.

The testimony fails to establish the defense of contributory negligence. Eubanks merely exchanged places with one of his fellow-brakemen, without orders from the conductor. Although it is probable he would not have been injured if he had remained in the position to which he had been assigned, yet it is not shown that the place he assumed was more dangerous than the one he vacated. In this connection, we notice the court charged that the plaintiff must prove that her intestate was free from fault or negligence. This was an error in favor of the defendant, and we only call attention to it for the purpose of another trial. Contributory negligence is a defense to be affirmatively proved. It will be presumed the injured party was in the exercise of due care until the contrary is made to appear.

In other respects, the jury was properly charged, except that the court should have granted this prayer of the defendant: "If you find the defects relied on in this action were such as are common to railroads, and such as could not have

been avoided by reasonable care and attention on the part of defendant, you will find for defendant."

A direction of this sort was necessary to guard the jury against being misled by the testimony in relation to the difference in height between the main and switch rails.

Reversed, and a new trial ordered.

VALIDITY OF CONTRACTS BY WHICH EMPLOYEES WAIVE RIGHT TO RECOVER FROM EMPLOYERS FOR INJURIES WHICH MAY BE RECEIVED IN COURSE OF THEIR EMPLOYMENT. — The decided weight of authority in this country sustains the proposition that a contract, whereby an employee agrees in advance to relieve his employer from liability from injuries resulting from the latter's negligence, or that of his other employees, when he is by law responsible for their negligence, is void as against public policy: 2 Thompson on Negligence, 1025; 1 Cent. L. J. 485; Greenhood on Public Policy, 528; *Roesner* v. *Hermann*, 10 Biss. 486; *Kansas Pacific R'y Co.* v. *Peavey*, 29 Kan. 169; 44 Am. Rep. 630; *Railway Co.* v. *Spangler*, 44 Ohio St. 471; 58 Am. Rep. 833. In *Roesner* v. *Hermann*, 10 Biss. 487, Gresham, J., delivering the opinion, said: "When the employer's negligence in supplying his employee with unsafe machinery has caused the death of the latter, the law will not allow the employer to say, as in effect he does in this answer, 'It is true that my machinery was defective and unsafe, and my negligence caused the death of my employee, but I am not liable to those who have suffered from the loss of his life, because I had a contract with him which secured to me the right to supply him with unsafe and defective machinery, and to be negligent.' Such a contract is void as against public policy. If there was no negligence, the defendant needed no contract to exempt him from liability; if he was negligent, the contract set out in his answer is of no avail." Horton, C. J., in delivering the opinion of the court in *Kansas Pacific R'y Co.* v. *Peavey*, 29 Kan. 169, 44 Am. Rep. 630, referring to the Kansas statute making a railroad company liable for the negligence of one employee causing injury to a co-employee, without regard to the negligence of the company in selecting or retaining the employee, said: "Now, if the statute was enacted for the better protection of the life and limb of railroad employees, it would be against public policy for the courts to sanction contracts made in advance for the release of this liability, especially when we consider the unequal situation of the laborer and his employer." And Owen, C. J., in delivering the opinion of the court in *Railway Co.* v. *Spangler*, 44 Ohio St. 471, 58 Am. Rep. 833, said: "The policy of our law being well settled, it only remains for us to inquire whether railroad companies may ignore or contravene that policy by private compact with their employees, stipulating that they shall not be held to a liability for the negligence of their servants, which public policy demands should attach to them. The answer is obvious. Such liability is not created for the protection of the employees simply, but has its reason and foundation in a public necessity and policy, which should not be asked to yield or surrender to mere private interests and agreements."

In the case of *Memphis and Charleston R. R. Co.* v. *Jones*, 2 Head, 517, the owner of certain slaves hired them to the railroad company to do work on its road. The contract of hiring contained this stipulation: "And all risks incurred or liability to accidents whilst in said service is compensated for and covered by the pay agreed upon; the said railroad company assuming

no responsibility for damages from accident or any cause whatever." This stipulation was held not to relieve the company from liability for any injury or loss arising or resulting from the willful wrong or gross negligence of the company or of its agents.

The supreme court of Georgia, in the cases of *Western and Atlantic R. R. Co.* v. *Bishop*, 50 Ga. 465, *Western and Atlantic R. R. Co.* v. *Strong*, 52 Id. 461, *Hendricks* v. *Western and Atlantic R. R. Co.*, 52 Id. 467, and *Galloway* v. *Western and Atlantic R. R. Co.*, 57 Id. 512, held that a contract between a railroad company and its employee, so far as it does not waive any criminal neglect of the company or of its principal officers, is a legal contract, and binding upon the employee. These decisions have been severely criticised by Judge Thompson: See 2 Thompson on Negligence, 1025; and 1 Cent. L. J. 485. And they do not seem to have given satisfaction to the people of the state of Georgia; for in the year 1876, the legislature of that state passed the following act: "If any person employed in any capacity whatever by any railroad company doing business in this state shall, in the course of such employment, be guilty of negligence, either by omission of duty, or by any act of commission, in relation to the matters intrusted to him, or about which he is employed, from which negligence serious injury, but not death, occurs or happens to any human being, such as breaking or dislocating or straining the bones or joints of the body, wounding the internal parts of the body, fracturing the skull, wounding the organs of sight, hearing, or speech, so as to impair their use, such person shall be guilty of the offense of criminal negligence; and upon the conviction thereof, upon indictment or presentment, shall be punished by imprisonment in the common jail not less than three nor more than twelve months, or by work on the chain-gang not less than two nor more than six months, or by confinement in the penitentiary not less than one nor more than two years, in the discretion of the court. The examples of serious injury given in this section are not intended to restrain or confine the meaning of the words 'serious injury,' but simply as illustrations of the same": Ga. Code, 1882, sec. 4586 b. In the case of *Cook* v. *Atlantic and Western R. R. Co.*, 72 Ga. 48, decided in 1883 under this act, the court held that although an employee of a railroad company may, by contract, waive his right to sue for injuries not arising from criminal negligence on the part of the company, or of its employees, yet any negligence, either of omission or commission, on the part of other employees of the road, in connection with their business, from which serious injury results, constitutes criminal negligence, and a contract waiving the right to sue for injuries resulting therefrom is contrary to public policy, and void. Blandford, J., who delivered the opinion of the court in that case, said: "No stipulation to waive any criminal neglect of the company is valid. The same is contrary to public policy, as declared by the statute. Every neglect which causes serious injury to any person by an agent, servant, or employee of a railroad company in this state is a crime by the laws of this state. And no release or waiver by any employee, or other person, of a railroad company on account of such neglect of its servants or agents, is binding upon the party making the same, but it is utterly null and void since the passage of the act of 1876."

In the case of *Darrigan* v. *New York etc. R. R. Co.*, 52 Conn. 285, it was queried whether a railroad company can by contract with its employee exempt itself from liability for its own negligence. But, as the question was not involved in the case, it was not decided. Wood says: "The master may exonerate himself from liability by expressly stipulating in the contract of

hiring that he shall not be held chargeable for injuries resulting from defects in machinery or the negligence of co-servants": Wood on Law of Master and Servant, sec. 415; 3 Wood on Law of Railways, 1493. The only authority cited by him in support of this proposition is the case of *Western and Atlantic R. R. Co.* v. *Bishop*, 50 Ga. 465, to which we have already referred. In 24 Albany Law Journal, 383, a preference is expressed for this view of the question. And this is no doubt the established doctrine of the English courts: *Griffiths* v. *Earl of Dudley*, L. R. 9 Q. B. D. 357. But, as has been shown, the current of American authority is the other way. Reason is clearly on the side of what, in view of the authorities, may be properly denominated the American doctrine on this question. It ought to be the policy of the state to preserve the lives of all its citizens. If that be the case, it is certainly contrary to public policy to permit them to contract away their lives and safety, and the more so when it is considered upon what unequal terms employers and employees generally contract. In all the states of the Union, except New York and New Jersey, where the question has been adjudicated, considerations of public policy have led the courts to decide that a common carrier cannot by contract with his customer absolve himself from liability for loss or damage resulting from the negligence of himself or of his agents or servants: See note to *Cole* v. *Goodwin*, 32 Am. Dec. 498 et seq.; note to *Ingalls* v. *Bills*, 43 Id. 367; note to *Clarke* v. *Rochester etc. R. R. Co.*, 67 Id. 217; *Alabama G. S. R. R. Co.* v. *Thomas*, Sup. Ct. Ala., Feb. 1888; 32 Am. & Eng. R. R. Cas. 464; *Little Rock etc. R'y Co.* v. *Talbot*, 39 Ark. 523; *St. Louis etc. R'y Co.* v. *Lesser*, 46 Id. 236; *Grogan* v. *Adams Exp. Co.*, 114 Pa. St. 523; Cooley on Torts, 2d ed., 825; Patterson on Railway Accident Law, 501. The state would seem to have as much interest in the preservation of the lives and safety of its citizens as in the preservation of their property intrusted to a common carrier. In Iowa, the code expressly enacts that no contract of a railroad company, by which it seeks to restrict its liability for injuries to an employee resulting from the negligence of its other employees, shall be legal or binding: Rev. Code Iowa, sec. 1307. But in *Kansas Pacific R'y Co.* v. *Peavey*, 29 Kan. 169, 44 Am. Rep. 630, it was held that the omission from the Kansas act of a clause like that in the Iowa act did not empower a railroad company to evade its liability by contract.

DUTY OF MASTER TO FURNISH SERVANT SAFE MACHINERY AND APPLIANCES: See *Little Rock etc. R'y Co.* v. *Leverett*, *ante*, p. 230, and note, where other cases are collected.

CONTRIBUTORY NEGLIGENCE, WHETHER MATTER OF DEFENSE: See *Little Rock etc. R'y Co.* v. *Leverett*, *ante*, p. 230, and note, where other cases are collected.

CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

ASPINWALL *v.* SABIN.

[22 NEBRASKA, 73.]

EVERY PRESUMPTION IS IN FAVOR OF CORRECTNESS AND REGULARITY OF PROCEEDINGS of courts of general jurisdiction, and error cannot be presumed. Bills of exceptions should therefore state affirmatively that they contain "all the evidence" submitted to the trial court.

ATTORNEY'S LIEN NOT AFFECTED BY FRAUDULENT SETTLEMENT OUT OF COURT. — In an action for divorce and alimony, the court made an order in the progress of the case, requiring the payment into court of a sum of money for attorneys' fees. Afterwards the parties to the action, collusively and fraudulently, and for the purpose of defrauding the attorney for the plaintiff out of the allowance made by the court for him, and with notice of an attorney's lien thereon in his favor, "settled and dismissed" the case. The attorney filed a motion to set aside the fraudulent settlement, and the court sustained the motion. No notice of the pendency of the motion was served upon the original plaintiff. *Held*, 1. That the motion was properly sustained, and the amount found due was properly ordered to be paid into court by the defendant; 2. That notice upon the original plaintiff of the pendency of the motion was unnecessary, as no relief was sought as against her, and it was not sought to affect her rights in any way.

L. W. Colby and R. S. Bibb, for the plaintiff in error.

Griggs and Rinaker, and R. W. Sabin, pro se, for the defendant in error.

By Court, REESE, J. On the seventh day of February, 1885, Lena Aspinwall instituted her action in the district court of Gage County against Oliver C. Aspinwall, in which she prayed for a divorce and alimony. During the progress of the case, proceedings were had which resulted in an order being made

by the court allowing her fifty dollars per month for the maintenance of herself and child, and three hundred dollars to be paid in three equal installments, for attorneys' fees and expenses of suit. From this order the defendant in that action appealed to the supreme court, where the decision of the district court was affirmed: See 18 Neb. 463. The alimony ordered to be paid, including the allowance for attorneys' fees, being unpaid, an execution was issued and levied upon the real estate of the defendant. On the fifteenth day of January, 1886, and after the levy of the execution, the parties to the suit "settled and dismissed" the case. This settlement and dismissal was by a stipulation prepared by an attorney who had had no connection with the case for either party. Whether or not any money was actually paid is not shown by the record. On the day following the settlement, the defendant in error filed and gave notice of an attorney's lien upon the three hundred dollars, and for the further sum of fifty dollars for money expended on behalf of plaintiff in said suit. On the 18th of the same month, the stipulation for the dismissal of the action and acknowledgment of satisfaction of the order for alimony were filed with the clerk of the district court. On the first day of February following, defendant in error filed a motion to set aside the settlement, upon the ground that it was made collusively and with the intent and purpose of defrauding him and preventing him from obtaining the compensation due him as the attorney for the plaintiff in the action. This motion was sustained, and plaintiff in error was ordered to pay into court the sum of three hundred dollars. The order was based upon the following findings of fact:—

"1. That there is due and owing to the said R. W. Sabin the sum of three hundred dollars, for his services as attorney for and on behalf of said plaintiff in and about the management of said cause.

"2. That the said satisfaction, filed January 18, 1886, of the decree for temporary alimony heretofore rendered in this cause, was made by and between said Lena Aspinwall, plaintiff, and said O. C. Aspinwall, defendant, for the purpose of cheating and defrauding the said R. W. Sabin out of said amount due him for services performed by him as attorney of and for plaintiff in and about the management of this cause.

"3. That the said satisfaction of said decree for temporary alimony is collusive, fraudulent, and void as against the said

claim of the said R. W. Sabin for said attorney fee due him as aforesaid, and the said satisfaction should be set aside, and be held for naught, so far as the same in any manner interferes with the collection from the said defendant of the amount of said attorney fee due the said R. W. Sabin as aforesaid.

"4. That at the time of the making, signing, and filing of the said satisfaction of the said decree for temporary alimony, the said Lena Aspinwall, plaintiff, and the said O. C. Aspinwall, defendant, well knew that the said R. W. Sabin had a lien for his services, as plaintiff's attorney in said cause, for the sum of three hundred dollars, and that no part of the same had been paid.

"5. That at the time of the making, signing, and filing of the said satisfaction of said decree for temporary alimony, the said O. C. Aspinwall, defendant, had due and legal notice of the lien of the said R. W. Sabin upon the said decree for the amount of three hundred dollars, for his services as attorney for and on behalf of said plaintiff in said cause as aforesaid."

It is insisted that the court erred in these findings, and that the findings should have been in favor of plaintiff in error. This question cannot be examined, for the reason that the certificate of the judge of the district court, attached to the bill of exceptions, shows affirmatively that the evidence before him at the hearing of the motion is not all included therein. The certificate is as follows:—

"In addition to the above, the other affidavits contained in the former bill of exceptions heretofore signed and filed in this case were considered by the court. And be it further remembered that the foregoing, as above stated, is all the evidence offered on the trial of said cause, either by the said R. W. Sabin or the defendant, and the objections made to the evidence, the rulings of the court thereon, and exceptions thereto, and the said defendant prays the court now here to sign and seal this his bill of exceptions, which is accordingly done," etc.

Every presumption is in favor of the correctness and regularity of the proceedings of the trial court, and error cannot be presumed: *Bedford* v. *Ruby*, 17 Neb. 98. Therefore it should affirmatively appear that the bill of exceptions contains all the evidence submitted to the trial court: *Railroad Co.* v. *Menk*, 4 Id. 21.

It is said that "the court had no jurisdiction of the subject-matter, the case having been settled and dismissed by the parties to the action, and the costs paid." In support of this

position, the decision of this court in *Lavender* v. *Atkins*, 20 Neb. 206, is cited. We do not think that case is in point here. As we have seen, the finding of the court in this case is, that plaintiff in error and his wife had full notice of the lien of the defendant in error, and that the settlement was made collusively and fraudulently for the purpose of defrauding defendant in error. So far as this proceeding is concerned, this finding must stand as true. In the case cited it is said: "No question of attorney's lien arises. No effort was made to comply with the provisions of the statute conferring such lien. Whatever rights Lavender's attorneys may have against defendants, if any, arise solely upon their contract, and cannot be litigated in this proceeding." In that case the attorneys sought to intervene and continue the litigation of the main case as plaintiffs. In this case the alleged settlement is attacked as fraudulent, in so far as it affects the rights of defendant in error. It is a well-settled principle of law that fraud vitiates everything into which it enters: *School District* v. *Randall*, 5 Neb. 411. Therefore, if the settlement was made as found by the court, it was void as to the defendant in error.

No notice of the pendency of the motion was given to or served upon Lena Aspinwall, the plaintiff in the original case. This fact is urged in support of the contention that the district court had no jurisdiction over her, and therefore could not legally make the order complained of. As no relief is sought as against her, and it is not sought to affect her rights in any particular, and no judgment or order was rendered against her, we cannot see that for that reason a judgment could not be entered against plaintiff in error, who appeared to the merits without objection.

No error affirmatively appearing of record, the judgment of the district court is affirmed.

Judgment affirmed.

ATTORNEY'S LIEN, and enforcement of: See *Humphrey* v. *Browning*, 95 Am. Dec. 446, and note 454; *Jones* v. *Morgan*, 99 Id. 458, and note 459; *Warfield* v. *Campbell*, 82 Id. 724; *Citizens' Nat. Bank* v. *Culver*, 20 Am. Rep. 134. Judgment debtor is bound to take notice of the lien of the attorney of the judgment creditor thereon: *Marshall* v. *Meech*, 10 Id. 572.

ACTS OF COURT OF GENERAL JURISDICTION ARE PRESUMED TO BE CORRECT: *Tunis* v. *Withrow*, 77 Am. Dec. 117; error must be apparent from the bill of exceptions: *Johnson* v. *Lightsey*, 73 Id. 450, and note 454; *Brown* v. *Gray*, 72 Id. 563; and see *Bloss* v. *Plymale*, 100 Id. 752.

WHITE LAKE LUMBER CO. *v.* RUSSELL.

[22 NEBRASKA, 126.]

LIEN OF MECHANICS AND MATERIAL-MEN UPON BUILDING OR IMPROVEMENT, in the construction of which labor or material is used, is purely a creature of the statutes, and such statutes, being remedial, must be liberally construed.

DESCRIPTION OF PROPERTY SOUGHT TO BE AFFECTED BY MECHANIC'S LIEN IS SUFFICIENT, under Nebraska Compiled Statutes, chapter 54, section 3, where the affidavit describes the improvement as situated on the southwest corner of lots 4, 5, and 6, in a block specified in a city or village, and gives the name of the owner of the property.

FACT THAT AFFIDAVIT FOR MECHANIC'S LIEN DESCRIBED MORE LAND than would be subject to the lien will not affect the legality of the proceeding, if not done fraudulently.

MECHANIC'S LIEN — OWNERSHIP OF THE PROPERTY. — The affidavit alleged that the material was sold to H. E. B. for C. E. B., who owned the property. It was shown upon the trial, to the satisfaction of the court, that the material was furnished for the express purpose of making an improvement upon the property of C. E. B. *Held*, that these facts sufficiently sustained the finding of the court that the material was sold upon a contract to be used in the improvement named.

ACTION to foreclose a mechanic's lien. The facts appear in the opinion.

Daniel F. Osgood, for the appellant.

S. P. Davidson, for the appellee.

By Court, REESE, J. This action was instituted in the district court for the purpose of foreclosing a mechanic's lien against the property of one Clara E. Bidwell, who was the owner of the real estate upon which the improvements were made. Appellant Russell, by leave of court, became a party to the action, and by his answer denied the allegation of plaintiff's petition, and sought the foreclosure of a mortgage held by him upon the premises in question, and bearing date subsequent to that of the alleged lien of plaintiff. He insists that plaintiff has no lien, by reason of a failure to comply with the law in the filing of the affidavit in the clerk's office, and for the further reason that it was not proven upon the trial that the lumber, from the sale of which the indebtedness arose, was sold to Clara E. Bidwell, the owner of the property; but that it was shown that it was sold to Henry E. Bidwell, her father, upon his credit alone, and that there never was a contract, either express or implied, with her for the furnishing of the material mentioned in the affidavit.

The first question which we will notice is as to the suffi-

ciency of the affidavit filed in the office of the county clerk. This affidavit is as follows:-

"STATE OF NEBRASKA, }
JOHNSON COUNTY. }

"After being duly sworn according to law, H. I. McCoy, agent of the White Lumber Company, at Sterling, Johnson County, Nebraska, deposes and says that the above bill is a true copy of his books, with proper credits; that the above-named items were sold and delivered to H. E. Bidwell, for Clara E. Bidwell, at his request, at times mentioned, and that the material herein named was used in building, remodeling, and repairing the building or barn owned by said Clara E. Bidwell, and situated on the southwest corner of lots 4, 5, and 6, in block 6, in the original town of Sterling, and converting the same into a building used for school purposes; that the balance due is unpaid, and said White Lake Lumber Company, for the better securing of same, hereby files this bill with intention of a mechanic's lien, and wishes it to be properly indexed, and so filed."

This affidavit is properly verified, and attached to it is an itemized statement of the account. The objection to it is, that the property upon which the lien is sought to be created is not described with sufficient particularity.

In the consideration of this part of the case, it must not be forgotten that the lien of mechanics and material-men upon a building or improvement, in the construction of which labor or material is used, is purely a creature of the statutes, and did not exist either at common law or in equity (Maxwell's Pleading and Practice, 700), and must therefore be considered with reference to the statute, as well in the manner of its enforcement as in its creation.

Section 3 of the mechanic's lien law of this state (Comp. Stats., c. 54, sec. 3) provides that any person entitled to a lien under the chapter "shall make an account in writing of the items of labor, skill, machinery furnished, or either of them, as the case may be, and after making oath thereto, shall, within four months of the time of performing such labor and skill, or furnishing such machinery or material, file the same in the county clerk's office of the county in which such labor, skill, and materials shall have been furnished, which account so made and filed shall be recorded in a separate book, to be provided by the clerk for that purpose, and shall, from the commencement of such labor, or the furnishing of such materials,

for two years after the filing of such lien, operate as a lien on the several descriptions of such structures and buildings, and the lots on which they stand," etc.

By this section, it will be seen, that, in order to secure a lien, it is necessary to file a statement of the account, properly verified, with the county clerk, and cause the same to be recorded. Whether or not it was the purpose of the legislature to make the lien effective without any description of the real estate sought to be affected, but that the lien should be in the nature of that imposed by a judgment, limited to the particular tract or lot upon which the improvement is made, we need not now inquire, as the affidavit in this case refers to the property sufficiently to apprise all persons of the location of the building thereon, and therefore of the property sought to be held. The language of the affidavit is, that the material was used in the rebuilding, etc., of "the building or barn owned by said Clara E. Bidwell, and situated on the southwest corner of lots 4, 5, and 6," in the block specified. The building standing upon the corner of the lots named, if they constitute a compact body of land and were owned by Clara E. Bidwell, would be sufficient of itself to charge third parties with knowledge of plaintiff's rights for the term of four months, without any notice, in the form of the verified account, being filed in the office of the county clerk. As to whether or not she did own the property, or whether it was contiguous, was a question of proof upon issue joined.

Statutes governing mechanics' liens are remedial, and must be liberally construed: *Rogers* v. *Omaha Hotel Co.*, 4 Neb. 59.

In Phillips on Mechanics' Liens, section 379, it is said that probably the best rule to be adopted is, "that if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, it will be sufficient. There is great reluctance to set aside a mechanic's lien merely for loose description, as the acts generally contemplate that the claimants should prepare their own papers; and it is not necessary that the description should be either full or precise. It is enough that the description points out and indicates the premises so that by applying it to the land it can be found and identified."

The affidavit describes the property upon which the building stands with particularity, and states that the location or site of said building is the southwest corner. If Clara E. Bidwell was the owner of the three lots named, and they were

used as one property, they would be within the meaning of "lot of land," as used in section 1 of the chapter of the statutes under consideration. The petition alleges that Clara E. Bidwell, at the time the material was furnished, was the owner of the south half of the lots described, and the lien is only asked as against that part. The fact that the affidavit described too much land will not render it void if not done fraudulently or designedly: *Oster* v. *Rabeneau*, 46 Mo. 596; *Whitenack* v. *Noe*, 11 N. J. Eq. 321. The lien will be held good upon whatever property belongs to the lot and curtilage, and is necessary to the enjoyment of the premises, which is a question of fact: *Edwards* v. *Derickson*, 28 N. J. L. 39. There is a very marked difference between a misdescription of the land and a vague one. If other and different property is described in an affidavit from that upon which the improvement is made, it might be a fatal variance, while an imperfect description might not affect the legality of the proceedings.

As to the second contention of appellant, it must be sufficient to say that the testimony of plaintiff's agent is, that he was well acquainted with the property on which the improvement was to be made, and that the lumber was purchased for that express purpose, and it was so used. The contract was made with Henry E. Bidwell, who was, without doubt, acting for his daughter. There was sufficient proof of these facts to sustain the finding of the trial court.

It is true that the preliminary proceedings taken for the purpose of establishing the lien were somewhat informal, but they were not void. The proof was sufficient to sustain the finding of the court upon the issue that Henry E. Bidwell purchased the lumber "for Clara E. Bidwell," as stated in the affidavit, and if so, he was her agent.

The judgment of the district court is affirmed.

Judgment affirmed.

MECHANIC'S LIEN, what certificate must set forth: *McPhee* v. *Litchfield*, 1 Am. St. Rep. 482, and cases in note 483; description of premises upon which lien is claimed: *Lindley* v. *Cross*, 99 Am. Dec. 610; *Kennedy* v. *House*, 80 Id. 594, note 596.

STATE LAWS, GIVING LIEN ON VESSELS FOR LABOR PERFORMED and materials furnished in their construction, are constitutional: *Foster* v. *The Richard Busteed*, 1 Am. Rep. 125; *Sheppard* v. *Steele*, 3 Id. 660; and the enforcement of such liens belong to the state tribunals: Id.

MAY v. SCHOOL DISTRICT.

[22 NEBRASKA, 205.]

LEGAL MAXIM, "LAPSE OF TIME DOES NOT BAR THE RIGHT OF THE STATE," applies only in favor of the sovereign power, and has no application to municipal corporations deriving their powers from the sovereign. Therefore, the statute of limitations runs for or against school districts or other municipal corporations as it does for or against individuals.

ACTION upon a school district warrant. The opinion states the facts.

E. H. Wooley, for the plaintiff in error.

H. D. Travis, for the defendant in error.

By Court, REESE, J. This action is founded upon a school district warrant or order, issued by the director and moderator of defendant, for seventy-five dollars, dated September 9, 1879, payable eighteen months after date. It is conceded that the warrant became due more than five years prior to the commencement of the suit, and that if the statute of limitations applies to school district warrants, the action cannot be maintained.

Section 10 of the Civil Code provides that civil actions can only be commenced within five years upon a specialty or any agreement, contract, or promise in writing. It is contended, upon the strength of the decision in *Brewer* v. *Otoe County*, 1 Neb. 273, that the statute of limitations does not apply to the indebtedness of municipal corporations.

In Woods on Limitations, section 53, it is said: "The maxim, *Nullum tempus occurit regi* (lapse of time does not bar the right of the crown), only applies in favor of the sovereign power, and has no application to municipal corporations, deriving their powers from the sovereign, although their powers, in a limited sense, are governmental. Thus the statute runs for or against towns and cities, in the same manner as it does for and against individuals."

Argument need not be prolonged upon this question; we shall be content with citing the following: *Cincinnati* v. *Evans*, 5 Ohio St. 594; *Lane* v. *Kennedy*, 13 Id. 42; *Cincinnati* v. *Church*, 8 Ohio, 299; *School Directors* v. *Georges*, 50 Mo. 194; *Kennebunkport* v. *Smith*, 22 Me. 445; *Clements* v. *Anderson*, 46 Miss. 581; *Evans* v. *Erie County*, 66 Pa. St. 222; *St. Charles County* v. *Powell*, 22 Id. 525; *Callaway County* v. *Nolley*, 31 Id. 393; *Abernathay* v. *Dennis*, 49 Id. 469; *Pimental* v. *San Fran-*

cisco, 21 Cal. 351; *Clark* v. *Iowa City*, 20 Wall. 583; *De Cordova* v. *Galveston*, 4 Tex. 470; *Underhill* v. *Trustees*, 17 Cal. 173; *Baker* v. *Johnson County*, 33 Iowa, 151; 2 Dillon on Municipal Corporations, sec. 668.

The questions discussed in *Brewer* v. *Otoe County*, *supra*, by Judge Lake, in writing the opinion of the court, do not arise in this case. That decision is based almost entirely upon statutes relating to county warrants. In referring to the section of the code above mentioned, the learned judge says: "This provision applies as well to actions where counties or other municipal corporations are parties as between private persons. The law recognizes no distinction in suitors, but is the same rule unto all."

In the case at bar, the warrant or order upon which the suit is founded was never audited by the board as such, but was signed by the officers separately. Hence no question of judicial action on the part of the board can arise.

The judgment of the district court being in favor of defendant is affirmed.

Judgment affirmed.

STATUTE OF LIMITATIONS RUNS AGAINST MUNICIPAL OR PUBLIC CORPORATIONS, though not against the state or sovereignty: *City of Pella* v. *Scholte*, 95 Am. Dec. 729, and note 740; *Crane* v. *Reeder*, 4 Am. Rep. 430.

STATE *v.* CORNER.

[22 NEBRASKA, 265.]

PROPER AND REASONABLE REGISTRATION LAWS ARE VALID, not as imposing upon the elector an additional and necessary qualification, created by statute, but as a method of proving the existence of the qualifications required by the constitution.

LEGISLATURE MAY REQUIRE REGISTRATION OF QUALIFIED VOTERS, under reasonable restrictions, as proof of the possession of the qualifications prescribed by the constitution; but it should be left within the power of the voter to prove himself to be an elector, and to register and vote at any time prior to the closing of the polls on election day.

REGISTRATION LAW WHICH ABSOLUTELY DEPRIVES ELECTOR OF RIGHT TO VOTE, unless registered on one of four days, the last one being ten days prior to the election, is void, as violating the provisions of the Nebraska constitution, article 1, section 22, that "all elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise."

NEBRASKA ACT, LAWS OF 1887, CHAPTER 39, ENTITLED "AN ACT TO AMEND THE ELECTION LAWS," etc., is in contravention of that clause of the state constitution (art. 3, sec. 11), relating to the amendment of laws, and is void.

ACTION in nature of *quo warranto*. The opinion states the case.

C. O. Whedon and Harwood, and Ames and Kelly, for the relator.

Billingsley and Woodward, for the respondents

By Court, REESE, J. The question presented in this cause is the constitutionality of chapter 39 of the session laws of 1887 (Comp. Stats. 1887, c. 26 a). The principal contention is, that the act violates the provisions of section 22 of the bill of rights, article 1 of the constitution of this state. This section is as follows: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." The act in question consists of eighty-two sections, and cannot be set out without extending this opinion to an unreasonable length, however desirable it might be to do so. We therefore must be content to refer to what may seem to be the more objectionable sections, as briefly as may be, yet giving them such consideration as the importance of the question requires.

The title of the act in question is, "An act to amend the election laws for metropolitan cities, and cities of the first class, in the state of Nebraska."

So far as the subject of registration is concerned, it must be sufficient to say that it is made the duty of the city council of cities of the class named in the act to appoint four judges of election and two poll clerks for each election district, in the month of September of each year, the officers so appointed to hold their offices for the term of one year, unless sooner removed by the mayor. The judges of election shall constitute the board of registration, each one of whom shall be provided with a register. They shall meet together and organize as such board, and register such electors of the election district as may personally appear for that purpose on the following days, and then only, to wit: On Tuesday four weeks, the Wednesday of the third week, and Friday and Saturday of the second week preceding the day of the November election in each year. No person shall be registered except those who personally present themselves for that purpose, and to all such an oath must be administered to truly answer such questions as may be put to them touching their place of residence, name, place of birth, qualifications as an elector, and right to register and vote.

The examination resulting in favor of the applicant, his name is entered upon each of the four registers, the proper memorandum being made in the several columns thereof. On each day of general registration, and before adjourning, the board is required to "enter in each of two books prepared for that purpose, one of which shall be known as the public copy of the registers, and the other of which shall be known as the election bureau copy of the registers, all such names and residences, and all such dates, information, and statements, as during the day have been entered by the judge of election in the registers provided for" by the act. "The whole six books shall, on each of said days, after a completion of such copies of the registers, be carefully compared throughout, so that each of the registers and copies thereof shall in every respect agree with each other, and contain the name and residence of each person who shall have applied for registration, and the fact respecting him, as the same shall have been stated by him and entered in their registers." The time in which the board may be in session each day is from eight o'clock in the morning until nine o'clock in the evening. "For all powers, authority, and duties" prescribed, and "all actions of the board, or of said judges, save where such authority is specifically allowed to each of said judges, the concurrence or assent of a majority of all the judges of election in any election district must in all cases be obtained." Section 24 of the act contains the following provision: "The judges of election in each election district of the city shall, on the day of any election therein, have with them at the polling-place in said district the registers provided for in this chapter. They shall each make use of one of said registers for guidance on said day, and no vote shall be received from any person whose name shall not be found by at least three (3) of them, to be upon at least three (3) of said registers as a qualified voter. The chairman of the judges in such election district shall, if present, and if absent, then one of the other judges shall, upon any person offering to vote, announce in a loud, clear, and distinct manner, the name of such person, and no ballots shall be received by either of the judges and deposited in any of the ballot-boxes, until at least three of said judges shall, as hereinafter provided, have examined and found the name of such person, and have declared the same, and that such person is entered as a qualified voter, when, if the vote of such person is received, at least three of the judges shall write in the ap-

propriate column, bearing the heading 'voted,' and opposite the name of such person, the word 'yes.'"

By the foregoing, it will be seen that the right of any elector to vote must depend upon his registration within the four days set apart for that purpose, and upon the further fact that on election day his name must be found, by at least three of the judges, upon three of the registers. If not registered on one of those days,—no matter what may have prevented,—he cannot vote. If he has registered, and by mistake his name has been left off two of the registers, he is equally disfranchised. He cannot register; nor can the registry be corrected on election day.

We enter upon the examination of the question involved in this case with a full appreciation of its gravity, and of the reluctance of courts to set aside the acts of the legislature as unconstitutional, and are mindful of the well-established rule that a law will be upheld if it can without doing violence to the fundamental law; yet it is a judicial duty, and one from which we cannot escape, to carefully consider the question, and if the act is in violation of the constitution, to so declare it.

Section 1 of article 7 of the constitution, entitled "Rights of Suffrage," provides that every male person of the age of twenty-one years, of the classes enumerated, "shall be an elector," and of course entitled to vote. Would the act in question hinder or impede the exercise of that right? This question is not a new one in this country, and the decisions of courts of last resort in the different states have been substantially unanimous in holding such laws absolutely void. It has been quite as uniformly held that proper and reasonable registration laws are valid, not as imposing an additional necessary qualification, created by statute, but as a method of proving the existence of the qualifications required by the constitution. This, so long as kept within the bounds of reason, is deemed to be a proper and just protection against fraud, and a preservation of the purity of elections, upon which must depend the safety and perpetuity of republican forms of government.

In *Dells* v. *Kennedy*, 49 Wis. 555, it was held by a majority of the court that where an elector possessed the qualifications prescribed by the constitution as an elector, he was vested with the constitutional right to vote, and that it was not within the power of the legislature to change, impair, add to, or abridge it in any respect; and that an act which provided

that no vote should be received at any general election, unless the name of the person offering to vote be on the register previously completed by a board of registry, was void. The same, in substance, was declared to be the law in *State* v. *Baker*, 38 Id. 71.

In *Daggett* v. *Hudson*, 43 Ohio St. 548, the same question was before the supreme court of Ohio, and the same conclusion was reached, after a careful examination and collation of the decisions of the supreme courts of the various states, in an exhaustive opinion written by Judge Atherton. Among the cases examined as sustaining the decision of that court were: *Page* v. *Allen*, 58 Pa. St. 338; 98 Am. Dec. 272; *Dells* v. *Kennedy, supra; State ex rel. Wood* v. *Baker*, 38 Wis. 71; *Edmonds* v. *Banbury*, 28 Iowa, 267; 4 Am. Rep. 177; *Monroe* v. *Collins*, 17 Ohio St. 666; and to which we may add *White* v. *County of Multnomah*, 13 Or. 317. Some of the cases cited go to the extent of holding that any law requiring the registration of voters is void, as hindering and impeding the exercise of the elective franchise, but we are quite well convinced that such holding is clearly at variance with reason and the weight of authority.

The true rule undoubtedly is, that the legislature may require registration under reasonable restrictions as proof of the possession of the qualifications prescribed by the constitution, but that the voter shall have the right to prove himself to be an elector, register and vote at any time prior to the closing of the polls on election day. It would doubtless be competent to require more proof on that day than if the voter had previously registered, but it should be left within his power to furnish such proof, if it existed, and exercise his right. As said in some of the decisions referred to, the fact that the name is not on the register is a challenge by statute of the person offering the vote, and that challenge should be overcome by proof. But this is not the case before us. By the act under consideration, but four days in the year are given to register, and then only when three of the judges of election are present. It matters not how imperative the demands of the voter elsewhere during those four days may be, or whether his absence is enforced by sickness of himself or family, or unavoidable detention from the voting district in which he may reside; he is disfranchised. Furthermore, he may appear before the judges for the purpose of registration, and although he may have been a resident and voter in the election district for a quarter

of a century, take the required oath, answer the questions propounded,—in short, comply with the requirements of the law in every particular; yet, if on election day his name is not found on three of the four registers, his vote cannot be received. The suggestion that such a law would not be a "hindrance or impediment to the right of a qualified voter to exercise the elective franchise," as is forbidden in the section of the constitution above quoted, is so manifestly unreasonable that the necessity for further argument ceases.

There are other considerations presented affecting the constitutionality of the act in question, which we deem it necessary to notice briefly.

The first section is clearly amendatory of section 8 of chapter 41 of the Compiled Statutes of 1885. By that section certain days are declared to be public holidays, to be observed in the matter of the presenting and protesting of commercial paper. The section under consideration amends that section by adding to the days named the days upon which general or local elections shall be held in the cities named; yet no reference is made to the section amended, as required by section 11 of article 3 of the constitution. Applying the rule stated in *Smails* v. *White*, 4 Neb. 353, there would seem to be an infraction of the constitution in this particular.

Section 247 of the Criminal Code defines the terms "felony" and "misdemeanor" to be, that a felony is such an offense as may be punished by death or imprisonment in the penitentiary, and "any other offense is a misdemeanor"; while sections 68, 70, and 71 of the act under consideration seem to ignore this section, and declare persons convicted of the offenses mentioned guilty of a misdemeanor, but fix the punishment at confinement in the penitentiary.

The act is quite crude, and it would be quite impracticable, if not impossible, to comply with many of its provisions.

By section 3 of the act to incorporate metropolitan cities, it is provided that such cities may include an area not to exceed twenty-five square miles, including any township or village organization within such limits, which organization shall thereupon terminate. This must necessarily include territory remote from the business center of the city, where large buildings, telegraph stations, etc., could not be found; but the act requires that no place shall be designated by the mayor as a place for holding elections which will not provide an unoccupied space allowed in front of the ballot-boxes, which shall be

equivalent to "forty feet square," sixteen hundred square feet. A patrolman shall carry the result of the election, as found by the canvass, "to the police headquarters, where the polling is located; and the captain or sergeant, or other officer in charge, shall immediately transmit, by telegraph or otherwise, the result of such statement to the city council."

By section 57 a number of acts and omissions are declared to be illegal, and it is declared that if any person shall aid, counsel, or advise the commission of any act forbidden by law or by the act (many of which are simple misdemeanors of the lower class), or shall omit to do an act required by law to be done, the party guilty of the act or default shall be adjudged guilty of a felony, and committed to the penitentiary for a term not less than one nor more than five years. All the expenses of an election in any county are declared to be a city charge, by the eighty-first section of the act.

These provisions (and many others which might be cited) are noticed for the purpose of calling attention to the fact that in its passage the act has not received the care which should be given to the enactment of laws. From a comparison with the election law of the state of New York applicable to the city of New York, it is plain that the act in question has been created by a somewhat random selection of sections from that law, without any reference to their adaptability to the laws and constitution of this state or our system of government, and hence is almost, if not entirely, incapable of enforcement.

The act being unconstitutional, the prayer of the petition is granted.

Judgment accordingly.

NO CONSTITUTIONAL QUALIFICATION OF ELECTOR CAN BE ABRIDGED, added to, or altered by legislation, or the pretense of legislation. And a registry act which tends to take away or unnecessarily postpone or embarrass the right of election would be set aside as unconstitutional: *Page* v. *Allen*, 98 Am. Dec. 272, and note 297; *Daggett* v. *Hudson*, 54 Am. Rep. 832, and note 843; *Kinneen* v. *Wells*, 59 Id. 105; *People* v. *Canaday*, 21 Id. 465. Compare *People* v. *Hoffman*, 56 Id. 793; *Edmonds* v. *Banbury*, 4 Id. 177.

SCHAFFER *v.* STATE.

[22 NEBRASKA, 557.]

INTENT OR PURPOSE TO KILL AT TIME OF COMMISSION OF ACT IS ESSENTIAL to constitute the crime of murder, as defined by sections 3 and 4 of the Nebraska Criminal Code, and this intent must be specifically and directly averred as a part of the description of the offense in every indictment for either of those crimes.

REQUIREMENTS OF NEBRASKA STATUTE ARE NOT SATISFIED by an averment in an indictment for murder that the accused "feloniously, purposely, and of deliberate and premeditated malice," did make an assault on the deceased, and that he then and there "feloniously, purposely, and of his deliberate and premeditated malice, did shoot" the deceased with a gun loaded with, etc., inflicting on him a mortal wound, of which he then and there instantly died. In such case the indictment does not charge murder, because the intent or purpose to produce death is nowhere alleged.

WHERE INDICTMENT FOR MURDER UNDER NEBRASKA STATUTE FAILS TO ALLEGE INTENT or purpose to kill, the defect is not cured by the concluding words of the indictment, "and so the grand jurors aforesaid," etc., do find and say that the accused "did, in manner and form aforesaid, feloniously, purposely, and of his deliberate and premeditated malice, kill and murder" the deceased. Such allegation is but a legal conclusion of the grand jury, drawn from the antecedent averments descriptive of the crime.

CONCLUDING WORDS OF INSTRUCTION TO JURY ON TRIAL OF INDICTMENT FOR MURDER, held to be unnecessary, and their omission proper in the particular case.

ERROR to the district court for Kearney County. The facts appear in the opinion.

Greene and Hostetler, and J. E. Shipman, for the plaintiff in error.

William Leese, attorney-general, and J. L. McPheely, for the state.

By Court, REESE, J. Plaintiff in error was convicted of the crime of murder in the first degree, and sentenced to be hanged. He alleges error, and brings the cause into this court for review. The indictment is as follows: —

"THE STATE OF NEBRASKA, } ss.
KEARNEY COUNTY. }

"Of the November term of the district court of the eighth judicial district of the state of Nebraska, within and for Kearney County, in said state, in the year of our Lord one thousand eight hundred and eighty-six, the grand jurors, chosen, selected, and sworn in and for the county of Kearney aforesaid, in the name and by the authority of the state of Ne-

braska, upon their oaths, present that John Schaffer, late of the county aforesaid, on the eighth day of November, in the year of our Lord one thousand eight hundred and eighty-six, in the county of Kearney and state of Nebraska aforesaid, did feloniously, purposely, and of his deliberate and premeditated malice, make an assault on one William H. Smith, then and there being, and a certain gun which then and there was loaded with gunpowder and thirty leaden shot, and by him, the said John Schaffer, had and held in both his hands, he, the said John Schaffer, did then and there feloniously, purposely, and of his deliberate and premeditated malice, shoot off and discharge at and upon the said William H. Smith, and thereby, and by thus striking the said William H. Smith with the said thirty leaden shot, inflicting on and in the head of him, the said William H. Smith, one mortal wound, of which said mortal wound the said William H. Smith then and there instantly died. And so the grand jurors aforesaid, on their oaths aforesaid, do find and say that the said John Schaffer did, in manner and form aforesaid, feloniously, purposely, and of his deliberate and premeditated malice, kill and murder the said William H. Smith, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska." Signed by the district attorney.

The question here is, Does this indictment charge the crime of murder in the first degree under the statutes of this state?

Section 3 of the Criminal Code is as follows: "If any person shall purposely, and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison or causing the same to be done, kill another; or if any person by willful and corrupt perjury, or by subornation of the same, shall purposely procure the conviction of an innocent person,—every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof, shall suffer death."

The provisions of this section, as applicable to the case at bar, are, that if any person shall purposely, and of deliberate and premeditated malice, kill another, every person so offending shall be deemed guilty of murder in the first degree, etc. The killing must be done purposely, and of deliberate and premeditated malice. That is, there must be an intent or purpose to kill at the time of the commission of the act, and the killing must be deliberately and premeditately done. This

is the plain and obvious meaning of the statute. Applying this statute to the indictment, we find an entire want of any allegation of an intent or purpose to kill. It is alleged that the assault was purposely made, and that the gun was purposely discharged, but with what intent or purpose these acts were done is nowhere alleged. The pleader has followed a precedent for an indictment for murder under the common law, and this would have been sufficient had not the legislature, by the enactment of the section above quoted, changed the essential ingredients or constituent elements of murder. At common law there were no degrees of murder, and there were but two degrees of felonious homicide. These were murder and manslaughter. By the statute we have two degrees of murder,—the first and second,—and manslaughter. At common law, murder is defined to be the unlawful killing of any reasonable creature, in being and under the king's peace, with malice aforethought, either expressed or implied: 4 Bla. Com. 198.

In Russell on Crimes, 482, it is defined as the unlawful killing of a human being under the king's peace, with malice, prepense, or aforethought, either express or implied by law. A purpose or design to kill is not an essential ingredient. But the rule of the common law has been changed, and the purpose, design, or intent to kill must now be alleged.

In Maxwell's Criminal Procedure, 176, it is said: "It is essential to the sufficiency of an indictment for murder in the first degree, under the statute, that it contain a direct and specific averment of the purpose or intention to kill, or intention to inflict a mortal wound, in the description of the crime."

This question was before the supreme court of Ohio in *Fouts* v. *State*, 8 Ohio St. 98, in the year 1857, under a statute from which the section above quoted has since been copied, and it was there held by a majority of the court, in an indictment substantially like the one in this case, that it was essential to the sufficiency of an indictment for murder in the first degree that it contain a direct and specific averment of the purpose or intention to kill or intention to inflict a mortal wound, in the description of the crime. So also in *Robbins* v. *State*, 8 Ohio St. 131, where the accused was convicted of murder in the first degree by the administration of poison, it was held that the conviction could not be sustained where there was no allegation of the purpose or intent to kill the deceased.

In *Kain* v. *State*, 8 Ohio St. 306, which was a conviction of

murder in the second degree, by shooting, as in this case, and where the indictment was in all essential respects like the one in this case, the judgment was set aside owing to the want of an allegation of the purpose or intent to kill, it being held that such purpose was an essential element of the crime as defined by the statute.

In *Hagan* v. *State*, 10 Ohio St. 459, the same question was before the same court, and resulted in a like decision. We quote from the first and second points in the decision:—

1. "Intent or purpose to kill is essential to constitute the crime of murder in the first or second degree as defined by the statutes of Ohio; and this intent must be specifically and directly averred as a part of the description of the offense in every indictment for either of these crimes."

2. "An averment that the accused 'purposely, and of deliberate and premeditated malice, did strike' the deceased, thereby inflicting a mortal wound, of which the deceased afterward died, does not satisfy the requirements of the law, for though the accused may have purposely and maliciously struck the deceased, it does not follow that the stroke was given with a design to produce death."

In *State* v. *Brown*, 21 Kan. 38, it was held that "where an indictment for murder charged substantially that the defendant deliberately and premeditatedly committed an assault and battery upon the deceased, by shooting him with a pistol loaded with gunpowder and leaden balls, and thereby inflicted a mortal wound, from which wound the deceased died, but did not anywhere charge that the defendant committed the assault and battery, or did the shooting or killing, with the deliberate and premeditated intention of killing deceased," it was held, under a statute similar to ours, that the indictment did not charge murder in the first degree.

The case of *Leonard* v. *Territory of Washington*, 2 Wash. 381, was where the plaintiff in error was indicted for the crime of murder in the first degree, and upon trial was found guilty as charged, and sentenced to be hanged. The section of the territorial statute under which he was prosecuted was as follows: "Every person who shall purposely and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be administered, kill another, every such person shall be deemed guilty of murder in the first degree," etc. The indictment was almost

identical with the indictment in this case, so far as the charge of killing was concerned, it being alleged that the accused "in and upon one Ambrose Patton, feloniously, purposely, and of deliberate and premeditated malice, did make an assault, and that the said Andrew Leonard, with a certain gun, then and there loaded and charged with leaden bullets, then and there feloniously, purposely, and of deliberate and premeditated malice, did discharge and shoot off, against and upon the said Ambrose Patton," etc., and it was held that the indictment was insufficient to sustain the conviction. See also *Fouts* v. *State*, 4 G. Greene, 500, and *State* v. *McCormick*, 27 Iowa, 402.

It may be suggested that the latter clause, or conclusion, of the indictment, "and so the grand jurors aforesaid, on their oaths aforesaid, do find and say," etc., brings the case within the rule here stated. This cannot be held to cure the defect, and it has been so decided in *Leonard* v. *Territory*, *Hagan* v. *State*, *Kain* v. *State*, and *Fouts* v. *State*, *supra*. See also Maxwell's Cr. Pr. 185. See also *Smith* v. *State*, 4 Neb. 277.

Objection is made to instruction numbered 13, given by the court to the jury. This instruction need not be here set out at length, as it was copied from the ninth instruction given in *Williams* v. *State*, 6 Neb. 334, and is there printed at page 336. While this instruction appears to have had the approval of this court in the very able opinion written in that case by Chief Justice Lake, yet it is apparent that it was not then before the court, and was only referred to by the writer of that opinion as a correct statement of the law giving the right to defend against threatened personal violence. I think the instruction is, perhaps, objectionable by reason of the words, "if you are fully satisfied that he was fully excused or justified under the circumstances in taking the life of the deceased." As I read it, the instruction would be complete without those words, and their addition could only serve to unnecessarily impress upon the jury the fact that they must find that the accused "was fully excused or justified" in taking the life of the deceased. While it is possible that the error, if any, would not be so far prejudicial as to call for a reversal of the judgment, yet I think the words quoted might with safety and propriety be omitted.

Other objections to the judgment of the court below are presented; but as they will not likely arise upon the next trial, they need not be here noticed.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

INDICTMENT FOR MURDER, SUFFICIENCY OF, IN GENERAL: See *People* v. *Arc*, 65 Am. Dec. 503, and cases cited in note 505; *People* v. *Tinder*, 81 Id. 77.

INDICTMENT, CERTAINTY REQUIRED IN STATEMENTS OF TIME, PLACE, AND PARTIES: *State* v. *Barnett*, 87 Am. Dec. 471, and note 475; *State* v. *Steeley*, 27 Am. Rep. 271.

WORDS CHARGING MALICE: *State* v. *Pike*, 6 Am. Rep. 533.

CONCLUDING WORDS OF INDICTMENT: *Lemons* v. *State*, 6 Am. Rep. 293; *Cox* v. *State*, 34 Id. 746.

CHARGING OFFENSE IN LANGUAGE OF STATUTE: *State* v. *Campbell*, 94 Am. Dec. 251, and note 253; *Portwood* v. *State*, 94 Id. 258; *Sparrenberger* v. *State*, 24 Am. Rep. 643.

SUFFICIENCY OF INDICTMENTS FOR MURDER — CERTAINTY REQUIRED. — It is said of all indictments that they "must have a precise and sufficient certainty": 4 Bla. Com. 306. By the rule of the common law, no one shall be held to answer to an indictment or information, unless the crime with which it is intended to charge him is expressed with reasonable precision, directness, and fullness, in order that he may be fully prepared to meet, and if he can to answer and repel, it: *Commonwealth* v. *Phillips*, 16 Pick. 211, 213; *Keller* v. *State*, 51 Ind. 111. A crime is made up of acts and intent, and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances: *United States* v. *Cruikshank*, 92 U. S. 542; *State* v. *Steeley*, 65 Mo. 218; 27 Am. Rep. 271; *State* v. *Lakey*, 65 Mo. 217; *Merwin* v. *People*, 26 Mich. 298; *Queen* v. *Aspinwall*, L. R. 2 Q. B. D. 48, 56. So in criminal cases prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation": U. S. Const., amend. 6; and this is construed to mean, that the indictment must set forth the offense with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged: *United States* v. *Mills*, 7 Pet. 142; and see *United States* v. *Cook*, 17 Wall. 174; *United States* v. *Cruikshank*, 92 U. S. 542; *Edwards* v. *State*, 27 Ark. 493.

Parts of Indictment — Caption. — The three prominent features of an indictment are: 1. The caption; 2. The charge; and 3. The conclusion. The caption is the heading to the indictment, but strictly speaking constitutes no part of it: *State* v. *Williams*, 2 McCord, 301; *State* v. *Moore*, 24 S. C. 150; 58 Am. Rep. 241; *State* v. *McCarty*, 2 Pinney, 513; 54 Am. Dec. 150; *People* v. *Bennett*, 37 N. Y. 117; 93 Am. Dec. 551; *Gray* v. *People*, 21 Hun, 140; *State* v. *Daniels*, 66 Mo. 192. It is, however, a part of the record, and as such, may aid the indictment: *Noles* v. *State*, 24 Ala. 672; *Anderson* v. *State*, 104 Ind. 467. Its office is to set forth the style of the court in which, the jurors by whom, and also the time and place at which, the indictment was found, with reasonable certainty: *State* v. *Moore*, 24 S. C. 150; 58 Am. Rep. 241; *State* v. *Gary*, 36 N. H. 359; *State* v. *Jenkins*, Sup. Ct. N. H., July 15, 1887; *Lovell* v. *State*, 45 Ind. 550; *State* v. *Conley*, 39 Me. 78; *State* v. *Thibeau*, 30 Vt. 100; *Williams* v. *State*, 3 Heisk. 376; if the caption is defective in these matters, it may be amended at any time by the journals of the court: *Vandyke* v. *Dare*, 1 Bail. 65; *State* v. *Moore*, 24 S. C. 150; 58 Am. Rep. 241;

Brown v. *Commonwealth*, 78 Pa. St. 122; *State* v. *Emmett*, 23 Wis. 632; and especially may it be amended in the matter of time: *State* v. *Blaisdell*, 49 N. H. 81; *State* v. *Jenkins*, Sup. Ct. N. H., July 15, 1887; *Commonwealth* v. *Smith*, 108 Mass. 486. But while it is conceded that the caption is no part of an indictment, there is some conflict of opinion as to where the caption ends and the indictment begins. In England, and in many of the states following the English practice, these words, "The jurors, etc., upon their oaths, present," are termed the commencement of the indictment, and are not considered to be a part of the caption: See *People* v. *Bennett*, 37 N. Y. 117; 93 Am. Dec. 551; *State* v. *Paine*, 1 Ind. 163; *State* v. *Hopkins*, 7 Blackf. 494. On the other hand, it has been held that these words are part of the caption, and mere introductory matter, constituting no portion of the indictment: *State* v. *Creight*, 1 Brev. 169; 2 Am. Dec. 656; *State* v. *Moore*, 24 S. C. 150; 58 Am. Rep. 241. It is further held that if it appears on the face of the record in the trial court, and from the transcript of the record after the removal into the appellate court, that the indictment is sufficient in form and substance, and that it was properly preferred by a lawful grand jury to a court having jurisdiction of the subject, it will be deemed sufficient, although the commencement be wholly omitted: *State* v. *Freeman*, 21 Mo. 482; *State* v. *Blakely*, 83 Id. 359; and see *State* v. *Daniels*, 66 Id. 192.

Charging Part of Indictment. — In reference to the charging part of an indictment, the law is strict in requiring the closest observance to established forms and precedents, and in demanding a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy. The same strictness is not required in reference to the caption, the distinction in the two cases being that the charging part is really the matter which the accused is called upon to meet and answer, while the caption is a mere history or record of the case up to the finding of the indictment: *State* v. *Moore*, 24 S. C. 150; 58 Am. Rep. 241. It is well settled that in charging the crime of murder, it is necessary that the facts should be stated with convenient certainty: *People* v. *Aro*, 6 Cal. 207; 65 Am. Dec. 503; *Willis* v. *People*, 1 Scam. 401; *White* v. *Commonwealth*, 9 Bush, 178. And formerly, there was no part of criminal pleading so difficult as to safely and correctly describe in an indictment the means and manner by which a murder was committed: See *State* v. *Owen*, 1 Murph. 452; 4 Am. Dec. 571; *State* v. *Fley*, 2 Brev. 338; 4 Am. Dec. 583; *Territory* v. *McFarlane*, 1 Mart. 211; 5 Am. Dec. 706; *White* v. *Commonwealth*, 6 Binn. 179; 6 Am. Dec. 443; *State* v. *Orrell*, 1 Dev. 139; 17 Am. Dec. 563; *State* v. *Crook*, 2 Bail. 66; 23 Am. Dec. 117; *Dukes* v. *State*, 11 Ind. 557; 71 Am. Dec. 370. But it has been more recently held that the principles of the common law require in capital cases only such rules of pleading as pertain to all crimes: *State* v. *Verrill*, 54 Me. 408, 413; and while the indictment must state the charge with as much certainty as the circumstances of the case will permit, nothing more than this is required: *Commonwealth* v. *Webster*, 5 Cush. 295; 52 Am. Dec. 711; *State* v. *Morrissey*, 70 Me. 401; compare *State* v. *Edmundson*, 64 Mo. 398; *State* v. *Ramsey*, 82 Id. 133. And in an indictment for murder, a count charging an assault and killing "in some way and manner, and by some means, instruments, and weapons to the jurors unknown," is good and sufficient, where the mode of killing cannot be more particularly described: *Commonwealth* v. *Webster*, 5 Cush. 295; 52 Am. Dec. 711; *Commonwealth* v. *Fenno*, 125 Mass. 387; *Commonwealth* v. *Martin*, 125 Id. 394; *State* v. *Wood*, 53 N. H. 484; *State* v. *Burke*, 54 Id. 92; *Colt* v. *People*, 1 Park. Cr. 611; *People* v. *Cronin*, 34 Cal. 191; *State* v. *Parker*, 65 N. C. 453. And several different and incon-

sistent modes of killing may be set out in the same indictment in different counts: *Smith* v. *Commonwealth*, 21 Gratt. 809. By the English statute 24 & 25 Vict., c. 100, in an indictment for felonious homicide, it is not necessary to set forth the manner in which or the means by which the death of the deceased was caused. And under the provisions of similar statutes which have been adopted in many of the states, indictments for murder, not setting forth the manner in which the killing was perpetrated, have been sustained: See *State* v. *Verrill*, 54 Me. 408; *State* v. *Morrissey*, 70 Id. 401; *Sneed* v. *People*, 38 Mich. 248; *Williams* v. *State*, 35 Ohio St. 175; *Cathcart* v. *Commonwealth*, 37 Pa. St. 108; *Campbell* v. *Commonwealth*, 84 Id. 187; *People* v. *King*, 27 Cal. 507. It is sufficient to charge that the accused did "feloniously, willfully, and of malice aforethought, kill and murder the deceased," naming him, and the time and appropriate place being stated: *People* v. *Cronin*, 34 Cal. 200; *People* v. *Davis*, 73 Id. 355; *State* v. *Shay*, 30 La. Ann. 114; *Edwards* v. *State*, 25 Ark. 444; *Newcomb* v. *State*, 37 Miss. 383; *Sarah* v. *State*, 28 Id. 267; *People* v. *Enoch*, 13 Wend. 159; *People* v. *White*, 22 Id. 167; *People* v. *Conroy*, 97 N. Y. 62; *Kennedy* v. *People*, 39 Id. 245. As to the certainty required in averments of time and place, see *State* v. *Stanley*, 33 Iowa, 526; *State* v. *Lakey*, 65 Mo. 217; *State* v. *Steeley*, 65 Id. 218; 27 Am. Rep. 271; *State* v. *Harp*, 31 Kan. 496. The name of the person murdered should be correctly given in the indictment: *Dias* v. *State*, 7 Blackf. 20. But it is enough to allege the name to be unknown, where the grand jury do not know what the name is: *Commonwealth* v. *Stoddard*, 9 Allen, 280; and see *Guthrie* v. *State*, 16 Neb. 667; *State* v. *Wilson*, 30 Conn. 500; *Reed* v. *State*, 16 Ark. 499; so it is enough to describe the deceased by his name alone, without an addition, where there are others of the same name: *Commonwealth* v. *Varney*, 10 Cush. 402; *Boyd* v. *State*, 17 Ga. 194; and if the name be that by which the person is generally known, though different from the true name, it is sufficient: *Mager* v. *State*, 42 Miss. 642; *McBeth* v. *State*, 50 Id. 81; and see *State* v. *Lincoln*, 17 Wis. 579; *State* v. *Angel*, 7 Ired. 27. So it is sufficient to allege the name of the deceased, without further alleging that he was a "reasonable creature in being": *Bean* v. *State*, 17 Tex. App. 60; *Wade* v. *State*, 23 Id. 308; *State* v. *Stanley*, 33 Iowa, 526. And in an indictment for infanticide, it is not indispensable that the sex of the murdered child be stated, even though its name be unknown or it has no name: *State* v. *Morrissey*, 70 Me. 401.

Requisities of Indictment for Murder under Statutes in Different States.— As to the sufficiency of an indictment or information charging an offense in the language of the statute, see *State* v. *Campbell*, 29 Tex. 44, 94 Am. Dec. 251, and extended note on the subject 252–258. In New York, it has been the steady ruling of the courts, through all changes of definition and of practice, to sustain the common-law form of an indictment for murder: See *People* v. *Willett*, 102 N. Y. 251, 254. And in an indictment under the Code of Criminal Procedure of that state for murder in the first degree, it is not necessary that the particular intent with which the homicide was committed should be set forth; it is sufficient to allege that it was done "feloniously, with malice aforethought, and contrary to the form of the statute": *People* v. *Conroy*, 97 Id. 62; an indictment in the common-law form is sufficient, notwithstanding the statute: *People* v. *McDonnell*, 92 Id. 657. So an indictment for murder in the first degree in the common-law form is held to be sufficient to support a conviction for deliberate or premeditated killing, under the Colorado statute. The expression, "feloniously, willfully, and of his malice aforethought," fairly includes the statutory idea of deliberation and premeditation: *Hill* v. *People*,

1 Col. 436; *Redus* v. *People*, Sup. Ct. Col., June 15, 1887; and see *State* v. *Pike*, 49 N. H. 399; 6 Am. Rep. 533; *State* v. *Johnson*, Sup. Ct. Minn., Dec. 8, 1887. An indictment for murder under the Iowa statute must charge that the killing was done with "malice aforethought," but it is not essential that these identical words be used. It is sufficient if words of the same import are used: *State* v. *Thurman*, 66 Iowa, 693; and to the same effect, see *State* v. *McGaffin*, 36 Kan. 315. The Florida statute makes the premeditated intent to kill necessary to constitute murder in the first degree, and it must be charged in the indictment, in the language of the statute, as having been perpetrated "from a premeditated design," as this alone distinguishes that crime from murder in the lesser degrees: *Denham* v. *State*, 22 Fla. 664; *Wiggins* v. *State*, Sup. Ct. Fla., March 2, 1887, and to the same effect, see *State* v. *Boyle*, 28 Iowa, 522; *State* v. *McCormick*, 27 Id. 402; *People* v. *O'Callaghan*, Sup. Ct. Idaho, Jan. 25, 1886; *State* v. *Brown*, 21 Kan. 38. But in an indictment for murder in the first degree under the Nevada statute, charging the homicide to have been with "malice aforethought" is tantamount to an averment that the act was "willful, deliberate, and premeditated": *State* v. *Hing*, 16 Nev. 307; *State* v. *Crozier*, 12 Id. 300, and see *People* v. *Ah Choy*, 1 Idaho, 317. But in the more recent case of *People* v. *O'Callaghan*, Sup. Ct. Idaho, Jan. 22, 1886, it is held that since the statute has narrowed and qualified the general definition of murder by a distinct and substantive definition of murder in the first degree, an indictment for murder as at common law would not necessarily include the charge of murder in the first degree, and the offense must therefore be pleaded substantially in the language of the statute.

In Texas, an indictment is sufficient to charge a murder of the first degree, if it charges that the accused "did, with malice aforethought, kill the deceased [naming him], by shooting him with a pistol." To allege that the killing was with "malice aforethought" is equivalent to alleging that the homicide was committed with express "malice aforethought": *Banks* v. *State*, 24 Tex. App. 599. But an indictment, to charge the offense of murder, must charge not merely that the accused murdered, but that he "killed," the deceased: *Strickland* v. *State*, 19 Id. 518; *Pierce* v. *State*, 21 Id. 669. Under the Missouri statute, murder in the second degree is murder at common law, and an indictment which charges the homicidal act to have been done "feloniously, willfully, and with malice aforethought," sufficiently charges the crime of murder in the second degree: *State* v. *Lowe*, 93 Mo. 547. The words "with malice aforethought" are held to be the legal equivalents of "with malice and premeditation": Id.; *State* v. *Curtis*, 70 Mo. 594; and see *State* v. *Robinson*, 73 Id. 306; *State* v. *Wieners*, 66 Id. 13. In California, the sufficiency of an indictment for murder is not to be tested by the rules of the common law, but by the requirements of the statute. If the indictment is certain as to the person and the offense charged, and states all the acts necessary to constitute a complete offense, it contains all that the statute requires: *People* v. *Murphy*, 39 Cal. 52; *People* v. *Cronin*, 34 Id. 200. If the indictment charges that the defendant inflicted the mortal blow, of which the deceased died, "feloniously, willfully, and of his malice aforethought," it is sufficient: *People* v. *Martin*, 47 Id. 102; and see *People* v. *Davis*, 73 Id. 355. In New Jersey, an indictment for murder in the first degree, following the statutory language in the essential particulars of charging "that the defendant did willfully, feloniously, and of his malice aforethought, kill and murder the deceased," is sufficient. It is unnecessary to set out in the count that the alleged killing was "willful, deliberate, and premeditated," which is one of the categories of murder mentioned in the statute: *Graves* v. *State*, 45 N. J. L.

203; *Titus* v. *State*, 49 Id. 36. An information alleging that the defendant "feloniously, willfully, deliberately, and with malice aforethought," assaulted, struck, stabbed, and cut H. with a knife, inflicting a mortal wound, from which H. died, and concluding by charging that the defendant, in the manner and form aforesaid, did "feloniously, willfully, deliberately, premeditatedly, and of malice aforethought," kill and murder H., was held to be unquestionably sufficient to charge an intentional murder: *State* v. *Smith*, 38 Kan. 194; and see *State* v. *Harp*, 31 Id. 496. In Minnesota, an indictment for murder in the first degree, instead of alleging the killing to have been done with "malice aforethought," the words used in the form given in the statute, may allege the killing to have been done "with the premeditated design to effect the death," which are the words used in the statute in defining murder in the first degree. The criminal character of the act is as strongly stated in the latter words as in the former: *State* v. *Holong*, Sup. Ct. Minn., April 30, 1888; and see *State* v. *Ryan*, 13 Minn. 370.

Conclusion of Indictment. — It is a constitutional requirement in many of the states that all indictments shall conclude "against the peace and dignity the state"; and it has been repeatedly held that an indictment which does not conclude with these constitutional words, or words of like import, is fatally defective: See *State* v. *Lopez*, 19 Mo. 255; *State* v. *Pemberton*, 30 Id. 376; *State* v. *Kean*, 10 N. H. 347; 34 Am. Dec. 162; *Zarresseler* v. *People*, 17 Ill. 101; *Commonwealth* v. *Carney*, 4 Gratt. 546; *Thompson's Case*, 20 Id. 724; *State* v. *Anthony*, 1 McCord, 285; *State* v. *Cadle*, 19 Ark. 613. Being a positive requirement of the constitution, the indictment must so conclude, the courts having no authority to dispense with what the constitution requires: *State* v. *Durst*, 7 Tex. 74; *Holden* v. *State*, 1 Tex. App. 225; *Rice* v. *State*, 4 Heisk. 215; *Williams* v. *State*, 27 Wis. 402; *Nicholas* v. *State*, 35 Id. 308. Thus an indictment concluding, "against the peace and dignity of the statute," was held to be invalid, the constitution requiring the conclusion, "against the peace and dignity of the state": *Cox* v. *State*, 8 Tex. App. 254; 34 Am. Rep. 746. So an indictment concluding, "against the peace and dignity of the state of W. Virginia," was held to be an insufficient compliance with a constitutional requirement that indictments shall conclude, "against the peace and dignity of the state of West Virginia": *Lemons* v. *State*, 4 W. Va. 755; 6 Am. Rep. 293. But in some of the states a literal compliance with the constitutional formula is not required, and it is held that redundant words not affecting the sense may be rejected as surplusage: See *State* v. *Kean*, 10 N. H. 347; 34 Am. Dec. 162. Thus in Missouri, the addition of the words "of Missouri" to the constitutional formula was held to furnish no valid ground of objection to the indictment: *State* v. *Hays*, 78 Mo. 600; and to the same effect, see *State* v. *Schloss*, 93 Id. 361; *State* v. *Robinson*, Sup. Ct. S. C., Jan. 5, 1888; *State* v. *Hill*, 19 S. C. 435; *State* v. *Waters*, 1 Mo. App. 7.

In every indictment founded on a statute, it is necessary to conclude "against the statute," unless the rule has been changed by legislation. The technical words, "against the form of the statute in such case made and provided," are usually employed, but equivalent expressions are just as sufficient in point of law, and have frequently been sustained: See *Commonwealth* v. *Caldwell*, 14 Mass. 330; *United States* v. *Andrews*, 2 Paine, 451; *State* v. *Bartlett*, 55 Me. 200; *People* v. *Conroy*, 97 N. Y. 62. It is only required that a phrase should be used which shows that the offense charged is founded on some statute: *United States* v. *Smith*, 2 Mason, 143, 150; and see *State* v. *Tribatt*, 10 Ired. 151. If an indictment charges an offense indictable at

common law, not being punishable by any statute, the concluding words, "contrary to the form of the statute," may be rejected as surplusage: *Commonwealth* v. *Reynolds*, 14 Gray, 87; 74 Am. Dec. 665. Under the Missouri statute (1 Rev. Stats. 1879, sec. 1821), an indictment will not be held bad because it fails to state the offense to have been contrary to the statute, and this, too, though the offense may have been created or the punishment declared by statute: *State* v. *Schloss*, 93 Mo. 361, 364. So in Kentucky, although an indictment describes an offense punished by statute, it is no longer necessary that it should conclude, "against the form of the statute": *Commonwealth* v. *Kennedy*, 15 B. Mon. 531. And the omission of the words, "contrary to the form of the statute," etc., does not vitiate the indictment under Arkansas laws, though the offense be created by statute: *State* v. *Cadle*, 19 Ark. 613; and see *Brown* v. *State*, 13 Id. 96.

CORTELYOU v. MABEN.

[22 NEBRASKA, 697.]

IT IS VALID ACCEPTANCE OF DRAFT where the drawee wrote across the face thereof the words, "Excepted Sept. 18. L. B. Maben." And parol evidence, not being inconsistent with the writing itself, is admissible to show that the purpose of the drawee in writing the word "excepted" was to "accept" the draft.

LAW IS SYSTEM OF RULES AND PRINCIPLES, in which the rights of parties are protected and enforced, and it is the duty of a court to disregard mere pretexts, and decide a case, if possible, upon the merits.

ERROR to the district court of Holt County. The opinion states the case.

Utley and Small, for the plaintiff in error.

By Court, MAXWELL, C. J. This action was brought in the district court of Holt County by the plaintiffs against the defendants, and on the trial the court held that the petition did not state a cause of action, and therefore refused to admit evidence under it. The jury thereupon returned a verdict for the defendants, and judgment was rendered thereon.

The following is a copy of the petition:—

"Plaintiffs complain of the defendants that whereas, on or about the seventeenth day of September, 1884, John M. Diels and Son drew their certain bill of exchange of that date, and then and there delivered the same to the Scribner State Bank, in the state of Nebraska, and then and thereby requested Maben and McCormick, at three days from sight thereof, to pay to the order of Scribner State Bank the sum of $498.70.

"The following is a copy of said bill, with all the indorsements thereon:—

"'$498.70. BANK OF EWING. Collection No. 287.
'SCRIBNER, NEB., Sept. 17, 1884.

"'At three days' sight, pay to the order of Scribner State Bank four hundred ninety-eight $\frac{70}{100}$ dollars, with coll. charges and exchange. JOHN M. DIELS & SON.

"'To MABEN AND MCCORMICK,
"'25,007. Deloit, Neb.'

"Across the face of said bill are written the following words: 'Excepted Sept. 18. L. B. Maben.' Indorsed on the back as follows: 'Pay to the order of Cortelyou, Ege, and Vanzant. John Baker, Cashier.' 'Received $58.77 on the within, October 24, 1884. Cortelyou, Ege, and Vanzant.'

"Plaintiff says that on the eighteenth day of September, 1884, said bill of exchange was duly accepted by L. B. Maben.

"On the seventeenth day of September, 1884, the said Scribner State Bank indorsed said bill of exchange as follows: 'Pay to the order of Cortelyou, Ege, and Vanzant. John Baker, Cashier,'—and delivered the same to the plaintiffs.

"On the day said bill of exchange became due and payable, it was duly and legally presented to said L. B. Maben, and payment thereof demanded, which was refused, all of which the said Scribner State Bank and John M. Diels and Son had due and legal notice. The said John M. Diels and Son are liable on said bill as drawers, and the said L. B. Maben as acceptor, and the said Scribner State Bank as indorsers.

"That on the twenty-fourth day of October, 1884, there was paid on said bill of exchange and indorsed thereon the sum of $58.77, and no more, and that there is now due and unpaid on the bill of exchange the sum of $439.30, with interest thereon from the twenty-fourth day of October, 1884."

There is also a stipulation in the records as follows: "It is stipulated and agreed by and between the parties to said action that the only question herein to be decided by the supreme court is, whether upon the trial hereof in the district court the plaintiff should have been allowed to prove, by witnesses called for that purpose, words spoken and expressions made by the defendant contemporaneous with his act of writing across the face of the draft herein the words, 'Excepted September 18. L. B. Maben'; that the defendant intended by writing said words to accept and honor said draft."

It is manifest that the court sustained the motion of defendant to exclude evidence offered by the plaintiff because of the

word "excepted" written by Maben across the face of the draft.

In a number of cases it has been held that the word "excepted" thus written is an acceptance: *Vanstrum* v. *Liljengren*, 33 N. W. Rep. 555; *Miller* v. *Butler*, 1 Cranch C. C. 470; 1 Daniel on Negotiable Instruments, sec. 497. The evident purpose of Maben in writing the word "excepted" was to accept the draft, and parol proof of this purpose, not being inconsistent with the writing, was proper, and should have been received. Had Maben intended to refuse acceptance, it was unnecessary to put such refusal in writing, and no doubt he was well aware of this fact.

The law is not a system of quirks and quibbles upon which courts may seize to defeat rights, but a system of rules and principles, in which the rights of parties are protected and enforced, and it is the duty of a court to disregard mere pretexts, and decide a case, if possible, upon the merits.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

ACCEPTANCE, NATURE OF AGREEMENT: *Swope* v. *Ross*, 80 Am. Dec. 567, and cases collected in note 570; *Jones* v. *State Bank*, 85 Id. 306; who may accept: *Heenan* v. *Nash*, 83 Id. 790.

DRAFT BINDS ACCEPTOR PERSONALLY, though addressed to and accepted by him as agent, if it fails to disclose his principal on its face: *Slawson* v. *Loring*, 81 Am. Dec. 750.

NEWLEAN *v.* OLSON.

[22 NEBRASKA, 717.]

CHATTEL MORTGAGE, LIKE ANY OTHER CONTRACT, IS TO BE CONSTRUED TOGETHER, the object being to ascertain with precision the mutual understanding of the parties. The whole instrument is to be viewed and compared in all its parts, so that every part of it may be made consistent and effectual.

MORTGAGEE OF CHATTELS IS NOT AUTHORIZED, WITHOUT CAUSE, TO SEIZE AND SELL the mortgaged property before the debt becomes due, under a provision in the mortgage that he may seize and sell the property, if he shall at any time feel "unsafe or insecure," and the mortgage also provides for interest in favor of the mortgagee, and that the debt is to be paid at certain times named, and thereby there is an implied agreement that the mortgagor shall remain in possession until a default in payment of the whole or a part.

CLAUSE IN CHATTEL MORTGAGE AUTHORIZING MORTGAGEE TO SELL if at any time he feels "unsafe or insecure" does not mean that he may,

arbitrarily and without cause, declare that he feels unsafe or insecure, but the mortgagor must be about to commit or has committed some act which tends to impair the security.

T. L. Lewis, for the plaintiff in error.

H. H. Bowes, for the defendant in error.

By Court, MAXWELL, C. J. On the 25th of September, 1886, the defendant in error purchased from the plaintiff one Moline spring wagon, one Henney top buggy, and one Deere, Wells, & Co. top buggy, and to secure the payment of the same executed and delivered to the plaintiff in error three instruments, alike except as to the time of payment, the first one of which is as follows:—

"$100. OAKLAND, NEB., Sept. 25, 1886.

"On or before the first day of March, 1887, for value received in two buggies and one spring wagon, the undersigned, living —— miles —— of Oakland post-office, county of Burt, state of Nebraska, promises to pay to Newlean and Hoard, or order, one hundred dollars, at Oakland, with interest from date until paid at the rate of ten per cent per annum. For the purpose of obtaining credit, I certify that I own in my own name in fee-simple —— acres of land in section —, town —, range —, county of ——, state of ——, with —— acres improved, worth $——, which is not encumbered by mortgage or otherwise, except $—— due ——, 188–. I also own two thousand dollars' worth of personal property over and above all indebtedness and exemptions. For value received, I, the undersigned, do hereby sell and mortgage unto the payee hereof, to secure the payment of the above-described note, one Moline spring wagon, one Henney top buggy, one Deere, Wells, & Co. top buggy, all with poles; two sorrel horses, bald face, eight and nine years old, now in my possession. Provided, that if the undersigned shall pay the said debt, then this mortgage shall be void. In case of default, I authorize the said mortgagee to seize and sell the said property at public or private sale, as they may elect, and pay the said debt with expenses incurred; or if the mortgagee shall at any time feel unsafe or insecure, they may seize and sell, as aforesaid, the property. Sale to take place at Oakland, Nebraska. If from any cause said property shall fail to satisfy said debt and expenses, I covenant and agree to pay the deficiency. OLE OLSON.

"Witness: A. D. PETERSON."

The Henney buggy proved defective, and was returned to the plaintiff in error, and the third of these instruments was canceled; and the balance, being thirty dollars, was to be indorsed upon one of the other instruments. The indorsement was not made, however. About the 1st of December, 1886, the plaintiff in error obtained possession of the horses and buggies upon the pretext that he felt insecure.

The defendant in error thereupon brought an action of replevin, upon the ground that he was entitled to the possession of the property at least until default was made in the payment of one of the instruments; and on the trial of the cause a jury was waived, and the cause submitted to the court, which found in favor of the defendant in error, and rendered judgment accordingly.

The testimony tends to show that Olson was engaged in the livery business at Oakland, Burt County; that his receipts from his business were from $5 to $7.50 per day; that he purchased the buggies in question for use in his business, and the plaintiff was well aware of that fact; the lien upon the horses was taken as additional security that in case Olson made default in the payment of the money the plaintiff would be amply secured.

The plaintiff claims that under the clause in the instrument above set out, — "if the mortgagee shall at any time feel unsafe or insecure, they may seize and sell, as aforesaid, the property," — he had the right to take possession at any time he saw fit, and that this right did not depend upon the facts, but upon his own pleasure or election.

A chattel mortgage, like any other contract, is to be construed together, and the object is to ascertain with precision the mutual understanding of the parties. The whole instrument is to be viewed and compared in all its parts, so that every part of it may be made consistent and effectual: 2 Kent's Com. 555; *People* v. *Gosper*, 3 Neb. 285; *Barton* v. *Fitzgerald*, 15 East, 541; *Merrill* v. *Gore*, 29 Me. 346. And the court, in construing the contract, should give effect to the provisions which carry out the evident intent of the parties. Here we find, in this case, credit was given, interest provided for in favor of the mortgagee, and an implied agreement on his part that if the mortgagor did not impair the security he should be entitled to retain possession of the property until the money became due. This clearly was the contract and the intent of the parties, and the mortgagee should not be per-

mitted to violate it. The words "if the mortgagee shall at any time feel unsafe or insecure" do not mean that he may, arbitrarily and without cause, declare that he feels unsafe or insecure. If this were so, a mortgagee might induce a mortgagor amply to secure a debt upon the implied promise that credit for a certain length of time would be given, and the instant after receiving the mortgage declare that he felt unsafe and insecure, and proceed at once to foreclose the mortgage. Such a rule would place the mortgagor entirely at the mercy of the mortgagee, and in many if not most cases deprive the mortgagor of the very means by which he could pay the debt. To justify the mortgagee, therefore, in his action in declaring that he feels unsafe and insecure, where there is an implied contract that the mortgagor shall remain in possession, the mortgagor must be about to commit or has committed some act which tends to impair the security, and unless such facts exist the right does not become operative.

The judgment of the district court, therefore, is clearly right, and is affirmed.

Judgment affirmed.

ORAL MORTGAGE OF CHATTELS, VALIDITY OF: *Bates* v. *Wiggin*, 1 Am. St. Rep. 234, and note 236.

MORTGAGE OF CHATTEL — MORTGAGOR IN POSSESSION — VALIDITY: See *Spraights* v. *Hawley*, 100 Am. Dec. 452, and note 458; *Mumford* v. *Canty*, 99 Id. 525; *Russell* v. *Winne*, 97 Id. 755; *Allen* v. *McCalla*, 96 Id. 56; *Kleine* v. *Katzenberger*, 5 Am. Rep. 630.

CHATTEL MORTGAGE, INSTRUMENTS CONSTRUED TOGETHER and constituting: *Taber* v. *Hamlin*, 93 Am. Dec. 113, and note 116.

CHATTEL MORTGAGE WHICH AUTHORIZES MORTGAGEE AT ANY TIME BEFORE DEFAULT, if he deem himself insecure, to take possession and sell, gives to the mortgagor the right of possession in the mean time: *Hall* v *Sampson*, 91 Am. Dec. 56, and see note 58.

CHATTEL MORTGAGEE AUTHORIZED TO TAKE POSSESSION whenever he may "deem himself in danger of losing said debt," etc., may do so, acting in good faith and upon facts subsequent to the mortgage, whenever he deems himself in such danger: *Barret* v. *Hart*, 51 Am. Rep. 801, and extended note 805; compare *Bailey* v. *Godfrey*, 5 Id. 157; *Roy* v. *Goings*, 36 Id. 151; *Werner* v. *Bergman*, 42 Id. 152; *Cline* v. *Libby*, 32 Id. 700.

UNION PACIFIC RAILWAY COMPANY v. SMERSH.

[22 NEBRASKA, 751.]

ORDER MADE BY COURT AGAINST GARNISHEE AFTER JUDGMENT cannot be collaterally attacked; but if proper proceedings are had before the payment of the money to the creditor to show that it was absolutely exempt, the court should withhold the money and refuse to apply it in satisfaction of the debt.

ALTHOUGH STATUTE DOES NOT REQUIRE NOTICE TO BE GIVEN TO JUDGMENT DEBTOR in cases of garnishment after judgment, yet such notice should be required in every case, and the courts have undoubted authority to require it to be given before the garnishee files his answer.

MONEY WHICH IS ABSOLUTELY EXEMPT IS NOT SUSCEPTIBLE of fraudulent alienation, and the debtor may make any disposition of it he sees fit, and plead the exemption, which, if proved, is a complete defense to any proceeding to apply the money to the payment of a judgment against him.

PROCEEDING in garnishment. The facts appear in the opinion.

A. J. Poppleton and J. S. Shropshire, for the plaintiff in error.

D. Van Etten, for the defendant in error.

By Court, MAXWELL, C. J. The defendant in error brought an action against one L. H. Webster, before a justice of the peace in Douglas County, and recovered a judgment for the sum of $45.83, and costs. Execution was duly issued on said judgment, and returned wholly unsatisfied. Afterwards an affidavit was filed before the justice, alleging that the Union Pacific Railway Company was indebted to Webster, and thereupon a summons in garnishment was issued and served on said company. The proceedings in garnishment are set forth in the transcript, as follows:—

"April 9, 1884, J. S. Shropshire, for garnishee, appeared and filed affidavit that garnishees were indebted to defendant in the sum of $53.90. Whereupon the garnishee was ordered to pay the same into this court.

"June 3, 1884. Amended answer of garnishee filed.

"June 3, 1884. Affidavit of defendant filed.

"June 10, 1884. Motion filed to discharge garnishee.

"STATE OF NEBRASKA, }
DOUGLAS COUNTY. }

"The Union Pacific Railway Company, garnishee, by J. S. Shropshire, who, being duly authorized to answer herein, files this its amended and supplemental answer in the above-entitled case, and says that the answer heretofore filed by the

garnishee herein was by oversight and mistake incomplete, in this, to wit, that at the time said answer was filed the said garnishee was not in fact indebted to said defendant, as affiant is informed and believes, for the reason that on the seventeenth day of March, 1884, the defendant sold and assigned to one Charles Brandes of Omaha the money sought to be garnished herein, and that said garnishee had notice of said assignment, but by accident and mistake this affiant was not notified of said fact in time to set the same up in the answer of the garnishee, filed as aforesaid. Affiant says that the said money answered as due said defendant was paid to the said assignee, who claimed and demanded the same.

"Affiant further says, if the said money had not been assigned as aforesaid, but, on the other hand, was due and payable to said defendant, it would have been exempt to said defendant under the laws of this state; that said defendant is a married man and the head of a family, consisting of a wife and children, whom he supports and with whom he resides in Douglas County, and that the said money was earned by him as laborer's wages, all within sixty days immediately preceding the date of the answer aforesaid. Affiant says that said plaintiff and this court have had notice since the answer was filed herein that said money was exempt to said defendant, for the reason above set forth; but affiant believes that the aid defendant up to this time has had no notice of the pending of said garnishment, and has had no opportunity to file his exemption.

"Wherefore garnishee asks to be discharged."

"STATE OF NEBRASKA, }
DOUGLAS COUNTY. }

"L. H. Webster, being duly sworn, deposes and says that he is the defendant above named; that he is a *bona fide* resident of Douglas County, Nebraska, and has been for eighteen years last past; that he is a married man and the head of a family, with whom he resides in said Douglas County, and whom he supports; that the money sought to be garnished in this action, in the hands of the Union Pacific Railway Company, was earned by him during the month of March, 1884, as a laborer; that prior to the service of the garnishment herein, to secure an indebtedness due to Charles Brandes of Omaha, he assigned to said Brandes the money garnished in this action; that if the said money had not been assigned as aforesaid, it would have been exempt to him under the laws of this state, by

reason of its being laborer's wages for less than sixty days, and he being the head of a family aforesaid. Affiant says that he only this day received notice of said garnishment, and was not aware that the court had made any order in respect to his earnings. Affiant further says that said plaintiff is well acquainted with this defendant, and well knows that the defendant is a resident of Douglas County, and that he is the head of a family, and that by reason thereof the said money is exempt to him under the laws of this state; but that the said plaintiff is taking this course for the purpose of maliciously prosecuting and annoying this defendant.

"Wherefore defendant asks that the garnishee herein may be discharged, and the order on the garnishee to pay said money into court be revoked and set aside."

Section 531 *a* of the code provides that "the wages of laborers, mechanics, and clerks who are heads of families, in the hands of those by whom such laborers, mechanics, or clerks may be employed, both before and after such wages shall be due, shall be exempt from the operation of attachment, execution, and garnishee process; provided, that not more than sixty days' wages shall be exempt; provided further, that nothing in this act shall be so construed as to protect the wages of persons who have or are about to abscond or leave the state from the provisions of law now in force upon that subject; provided further, that nothing in this act shall be so construed as to permit the attachment of sixty days' wages in the hands of the employer."

In *Wright* v. *Chicago etc. R. R. Co.*, 19 Neb. 175, the court, in construing this statute, held that "the wages for sixty days' services of laborers, mechanics, or clerks who are heads of families, in the hands of those by whom such laborers, mechanics, or clerks may be employed, are exempt from execution, attachment, or garnishment, whether the employee is a resident of the state or not. Such wages are absolutely exempt." See also *Turner* v. *S. C. & P. R. R.*, 19 Neb. 241.

In *Albrecht* v. *Treitschke*, 17 Neb. 205, it is held that where a creditor obtained by garnishee process the exempt wages due a laborer, and applied the same to a judgment in his favor, a cause of action thereby arose in favor of the debtor against the creditor, unless the exemption was waived. It is said (page 207): "It is well settled that if exempt property is seized and applied to the payment of a judgment, the owner may have his action against the wrong-doer, unless such exemption is waived by

some act or omission of the debtor: *Haswell* v. *Parsons*, 15 Cal. 266. The wrong-doer in this case was the defendant. He has procured property to be applied to the payment of his judgment to which he was not entitled. He must refund it: *Phillips* v. *Hunter*, 2 H. Black. 402."

In *Wilson* v. *Burney*, 8 Neb. 39, it was held that an order against a garnishee after judgment could not be collaterally attacked. See also *Clark* v. *Foxworthy*, 14 Neb. 241; and *B. & M. R. R. Co.* v. *Chicago Lumber Co.*, 18 Neb. 303. While the order is so far final that the garnishee cannot dispute it, yet if the proper proceedings are had before the payment of the money to the creditor to show that the money was absolutely exempt, it would be the duty of the court to withhold the money and refuse to apply it in satisfaction of the debt. There is nothing in this record to show that the railway company, at the time it answered, had notice that Webster was the head of a family, and that therefore his wages for sixty days were exempt. But it does appear that Webster had no notice of the garnishment proceedings until a day or two before the motion to discharge the garnishee was filed. If the money in the hands of the Union Pacific Railroad Company, or in the hands of the justice, was exempt from levy, either by attachment or execution, and not liable to be applied to the payment of Webster's debts, he should be permitted to show that fact at any time before the payment of the money to such creditor. While the statute does not require notice to be given to the judgment debtor in cases of garnishment after judgment, yet it is obvious that such notice should be required in every case, and courts have undoubted authority to require such notice to be given. Otherwise it would be possible for a garnishee to answer, pay the amount owing by him to the debtor into court, and the court apply the same to the payment of the debt without the judgment debtor having any notice whatever. We hold, therefore, that the judgment debtor, and also the garnishee, had a right to bring to the attention of the court facts showing that the money in question was not subject to the payment of the judgment in question, and that if paid, could have been recovered in a proper action. The money, being exempt, was not susceptible of fraudulent alienation, and the debtor could make such disposition of it as he saw fit, and plead the exemption, which, if proved, is a complete defense.

It follows that the judgment of the district court must be reversed and the cause remanded.

Reversed and remanded.

EXEMPTION UNDER STATUTE, HOW PLEADED: *McCoy* v. *Brennan*, 1 Am. St. Rep. 589.

PARTY CANNOT BE GARNISHED WHEN HE CANNOT APPEAR, confess judgment, and have costs allowed: *Cockey* v. *Leister*, 71 Am. Dec. 588, and see note 592.

EXEMPTION OF JUDGMENT DEBTOR'S EARNINGS: *Brown* v. *Hebard*, 91 Am. Dec. 408, and note 411–425.

NO PROCESS OR PROCEEDINGS CAN PLACE GARNISHEE IN DIFFERENT OR WORSE POSITION than he would have occupied if sued directly by the debtor in the attachment suit: *Weil* v. *Tyler*, 90 Am. Dec. 441.

FIRST NATIONAL BANK *v.* STATE BANK.

[22 NEBRASKA, 769.]

ONE WHO PAYS FORGED CHECK DOES SO AT HIS PERIL, and if by means of his indorsement and use of the same he thereby obtains money from another, he is liable for the amount thus obtained.

BANKS AND BANKING — LIABILITY FOR PAYMENT ON FORGED CHECK. — A check was presented to the bank of O., purporting to be drawn by one C. on the bank of A. for $385. The cashier of the bank of O. was unacquainted with the person who presented the check, and required no proof as to his identity, but paid the check, after comparing the signature of the purported drawer with his genuine signature in the signature-book of said bank. The check was then sent to a bank in Lincoln, and was there credited to the bank of O., and forwarded by the Lincoln bank to the bank at A., on which it was drawn, and it was paid by said bank. It was afterwards discovered that the check was a forgery, and the bank at Lincoln, and also the bank of O., were notified thereof. *Held*, that the latter was liable for the amount received by it on the check.

ACTION to recover money paid on a forged check. The facts appear in the opinion.

W. S. Morlan, for the plaintiff in error.

John Dawson, for the defendant in error.

By Court, MAXWELL, C. J. The case was submitted to the court below upon a stipulation of facts, as follows: "For the purpose of this action, this case is submitted by the plaintiff and defendant upon the following statement of agreed facts: On or about the first day of January, 1886, a stranger appeared at the counter of the First National Bank of Orleans, Nebraska, and presented the foregoing check, marked 'A.' At the date of the said check and its presentation, and for a long time prior thereto, B. R. Claypool, whose check it was represented to be, was a customer of the First National Bank of Orleans, and also the State Bank of Alma, and each bank had money to his credit subject to check. And both of said banks sup-

posed that they were acquainted with his signature. The cashier of the First National Bank of Orleans was unacquainted with the person who presented the check, and did not request him to produce any proof as to being the person entitled to the money on the check. Neither was he identified as being the A. J. Gype mentioned in the said check before paying the check. The cashier compared the signature of B. R. Claypool on the check with his genuine signature on the signature-book of said bank, for the purpose of ascertaining its genuineness, and after said comparison, believed said signature to be genuine, and thereupon paid said check, charging the person who purported to be A. J. Gype the sum of eighty cents exchange. At the time of paying said check, said Claypool had money in the bank paying said check sufficient to pay said check. That on the first of January, 1886, said First National Bank of Orleans transmitted said check to the Capital National Bank of Lincoln, which bank at the time, and was for a long time prior to that time, a correspondent of both the State Bank of Alma and the First National Bank of Orleans, Nebraska, and none of the foregoing facts were known to the Capital National Bank. That upon the receipt of said check, the Capital National Bank of Lincoln, to wit, on the second day of January, 1886, credited the First National Bank of Orleans with the amount of said check, and on the fourth day of January, 1886, forwarded it to the State Bank of Alma, and charged the State Bank of Alma with that amount. Said check was indorsed both by the Capital National Bank and the First National Bank of Orleans, as appears indorsed on said check. On the fifth day of January, 1886, upon the arrival of said check at the State Bank of Alma, said bank paid the same by giving the Capital National Bank credit for the same, not knowing at the time that said check was forged. That said check was a forgery, and the name of Claypool was never written by him or by his authority. On the twenty-third day of January, 1886, when the bank-book of said Claypool was balanced at the State Bank of Alma, and his checks were presented to him which had been paid by said bank, he denied the genuineness of this check in controversy, which was the first the State Bank officers knew of said check being a forgery. After knowing said check was forged, to wit, on the twenty-fourth day of January, 1886, the State Bank officers notified both the Capital National Bank and the First National Bank of Orleans that said check was forged, and

charged the same back to the Capital National Bank of Lincoln, and forwarded said check to Lincoln, to the Capital National Bank, who refused to take the same, or to credit the State Bank with the amount thereof. That the signature of said check was very similar to the genuine signature of said Claypool; that said A. J. Gype, the payee of said check, has not been heard of since the payment of said check by the First National Bank of Orleans, and was an entire stranger to all of said banks above mentioned before the presentment and payment of said check; that if the Capital National Bank is liable, according to the above agreed statement of facts, to the State Bank of Alma for the amount of said check, then it is agreed that judgment be given against the First National Bank of Orleans instead of the Capital National Bank.

"If under the foregoing state of facts an action would lie in favor of the State Bank of Alma directly against the First National Bank of Orleans, and it would be liable to the State Bank under this agreed statement of facts, then judgment shall be given accordingly."

The following is a copy of the check:—

"$385. ALMA, NEB., Dec. 18, 1885.

"State Bank of Alma, pay to A. J. Gype, of Alma, Neb., or bearer, three hundred and eighty-five dollars.

"B. R. CLAYPOOL."

On the trial of the cause the court found in favor of the State Bank of Alma.

On principle, it would seem that a bank paying a forged check drawn on another bank would do so at its peril; that where it is proposed to draw funds belonging to another by means of a check, that such check should be drawn by the proper authority. The bank to which the check is presented by a stranger may require his identification and proof that he is the lawful holder of the check. It must take the necessary steps to ascertain the genuineness of the instrument and the identity of the person presenting it, or in case of loss from such neglect it will be the party at fault. A bank receiving a check from one which has paid it may rightfully assume that the paying bank required the necessary proof, both as to the genuineness of the instrument and the authority of the holder to receive the money thereon. Ordinarily, it will not be known in the second bank that the person presenting the check to the bank paying the same was a stranger and no identification was required. Nor can it be known that the drawer was

not present in the bank when the check was presented and paid. The second bank, therefore, having received the check from a creditable bank, may assume that it has taken the necessary precautions to ascertain the genuineness of the signature and the identity of the person presenting the check. In this case, had the plaintiff in error required the holder of the check to prove who he was, and the manner in which he came by the check, in all probability he would have declined the ordeal, and the check would not have been paid. The loss, therefore, may be traced directly to the plaintiff's neligence.

The case of *Ellis* v. *Ohio Life Insurance and Trust Co.*, 4 Ohio St. 628, is similar in many respects to that under consideration. It is said (page 662): "To entitle the holder to retain money obtained by mistake upon a forged instrument, he must occupy the vantage-ground by putting the drawer alone in the wrong; and he must be able truthfully to assert that he put the whole responsibility upon the drawer and relied upon him to decide, and that the mistake arising from his negligence cannot now be corrected without placing the holder in a worse position than though payment had been refused. If the holder cannot say this, and especialy if the failure to detect the forgery and consequent loss can be traced to his own disregard of duty in negligently omitting to exercise some precaution which he had undertaken to perform, he fails to establish a superior equity to the money, and cannot with a good conscience retain it. To allow him to do so would be to permit him to take advantage of his own wrong, and to pervert a rule designed for his protection against the negligence of the drawer into one for doing injustice to him." See also *Goddard* v. *Merchants' Bank*, 4 N. Y. 147; *Bank of Commerce* v. *Union Bank*, 3 Id. 230; *Canal Bank* v. *Bank of Albany*, 1 Hill, 287.

In the last case the indorsement of the payee was forged, and the money paid by the drawers was recovered back, although the forgery was not discovered for two months after payment, and the remedy against the other indorsers was lost.

In *Third National Bank* v. *Allen*, 59 Mo. 311, where a bank having paid to a stranger a check drawn upon another bank, and collected the amount from the latter, at the time of the payment neither bank was aware of the forgery. The next day after the payment, the bank on which the check was drawn ascertained the forgery, and on that day or the succeeding one notified the first bank of that fact. It was held that

the notice was given in a reasonable time, and that the money could be recovered back.

In that case the money had been drawn on a check for the sum of $20, payable to a stranger, who, before presenting it to the bank, had altered it by substituing $328.68 in place of $20, and also by changing the name of the payor, the signature to the check being genuine.

In *Espy* v. *Bank of Cincinnati*, 18 Wall. 604, a check was drawn by Stall and Meyer on the defendant for $26.50, in favor of Mrs. Hart. This was raised by substituting $3,920 for $26.50, and the name of Espy, Heidlebach, & Co. for that of Mrs. Hart as payee. The check thus altered was presented to the bank and paid by it through the clearing-house. The court held if this were all the case there would be no doubt of the right to recover. Espy, Heidlebach, & Co., however, had sent the check to the bank before paying the same, and were informed that it was good, — a question which does not arise in this case.

After a careful examination of the authorities, we have no doubt that a party who pays a forged check does so at his peril, and if by means of his indorsement and use of the same he thereby obtains money from another, he is liable for the amount thus received. The Capital National Bank, and also the State Bank of Alma, had the right to assume that an instrument sent forth with an indorsement of the plaintiffs, on which they received value, was genuine.

There is no error in the record, and the judgment of the district court is affirmed.

Judgment affirmed.

BANK PAYING FORGED CHECK OF ONE OF ITS OWN DEPOSITORS MUST SUFFER LOSS: *Commercial etc. Nat. Bank* v. *First Nat. Bank*, 96 Am. Dec. 554, and note 567; *Seventh Nat. Bank* v. *Cook*, 13 Am. Rep. 751, and note 752.

RECOVERY BY BANK OF MONEY PAID ON FORGED CHECK: *Nat. Bank* v. *Bangs*, 8 Am. Rep. 349; *First National Bank* v. *Ricker*, 22 Id. 104; *Nat. Park Bank* v. *Ninth National Bank*, 7 Id. 310, and note 313; *Parke* v. *Roser*, 33 Id. 102.

CASES

IN THE

COURT OF ERRORS AND APPEALS

OF

NEW JERSEY.

WARWICK *v.* LAWRENCE.

[43 NEW JERSEY EQUITY, 179.]

AGREEMENT BY MARRIED WOMAN TO HAVE HER MONEY APPLIED to the payment of the debts of her husband or those of any other person, so long as it remains executory, cannot be enforced against her, either at law or in equity; but after the agreement has been completely executed, she cannot abrogate her consent, and reclaim the money.

DISTINCTION BETWEEN EXECUTORY CONTRACT OF MARRIED WOMAN and one that is executed is illustrated in the case of a bond and mortgage given by her to secure the debt of another person; the contract in the bond, being executory, cannot be enforced against her, but the conveyance by the mortgage being executed, her title can be foreclosed in equity.

APPEAL from a decree of the court of chancery. The opinion states the case.

A. G. Richey, for the appellant.

William Clark, for the respondent.

By Court, BEASLEY, C. J. Anna Lawrence, the respondent, in her bill exhibited in the court below, alleged that one Emson being largely in her debt, she employed William Warwick, the appellant, as her agent, to collect the moneys so due, and that in pursuance of such authority, he received the sum of $952.30, which it was agreed he should hold in his hands until the determination of a suit then pending. The bill further alleged that the suit so referred to was decided in her favor, and that thereby she became entitled to the moneys in

question. The answer of Warwick admits the receipt of the sum above mentioned, and by way of defense, sets up that the complainant and her husband, at the time he, Warwick, undertook said agency, agreed in writing that he "should take out of and retain from the first moneys that he should receive for them a sufficient amount to pay and satisfy him for all moneys loaned or advanced by him, or expended by him for them or either of them." This agreement was duly proved, and it was also shown that Warwick had advanced or paid for the complainant and her husband an amount of money in excess of the sum which had been received by the appellant from the said Emson, such outlays having been made for the most part for the husband of the complainant.

The vice-chancellor, on the hearing before him, allowed a deduction from the moneys in the hands of Warwick of the sums paid by him to the complainant, but rejected the payments made by him for her husband, the ground of decision being that the separate estate of the wife could not be charged with the debts of the husband, even though the moneys be advanced upon an express promise in writing to pay out of a particular fund.

In avoidance of the force of the legal rule thus asserted, the counsel of the appellant insists that the evidence shows that the moneys received by Warwick, as already stated, were not, in point of fact, the moneys of Mrs. Lawrence, but belonged jointly to her and her husband; but it is obvious that if we assume the existence of such premises, only a half defense would be conceded, for if the wife owned a moiety of the fund, such portion would be protected against her assumptions of the debts of her husband in the same manner that the whole fund would have been protected if she had been invested with the exclusive ownership of it.

But we think, looking somewhat deeper into the principle underlying the case, that the complainant is not entitled to recover any part of these moneys. Construing the facts most favorably to the complainant, and regarding the fund in question as her exclusive property, the transaction, in substance and effect, was an application by her of such moneys in satisfaction of the debts of her husband, and there is nothing in the law of this state that forbids a married woman from making such a disposition of her property. The married woman's act authorizes a *feme covert* to acquire and hold property of all kinds, and invests her completely with the *jus disponendi*. It

is also declared that she shall have the right to bind herself by contract in the same manner and to the same extent as though she were unmarried, such latter power being restricted by the proviso that "nothing in this act contained shall enable such married woman to become an accommodation indorser, guarantor, or surety, nor shall she be liable on any promise to pay the debt or answer for the default or liability of any other person."

From this quotation, it is obvious that the agreement of the complainant touching the employment of her moneys in liquidation of the debts of her husband, so long as the same remained executory, could not have been enforced against her either at law or in equity. Such an agreement was a promise to pay the debt of another out of a particular fund, and the statute in express terms witholds from her the power to assume such an obligation. But there is another constituent of this case which appears to have been overlooked by the court below and by the counsel, and that is the fact that when this bill was filed the agreement of the complainant had been for a long time completely executed,—the moneys in question had been collected by Warwick, and by virtue of the agreement of the complainant, had been applied in payment of the debts due from her and from her husband,—and the question to be decided, therefore, is, whether after such complete execution of her contract she can abrogate her consent and reclaim the moneys.

We see nothing in the statute nor in the general principles of jurisprudence that appears to indicate the existence of a power so unnecessary for the reasonable protection of the married woman, and which would be so liable to abuse. A married woman cannot bind herself to pay the debts of another, but she can pass over her money or property for that purpose, and it cannot reasonably be contended that after the doing of that act she can at will avoid it. In the present instance, Mrs. Lawrence, the complainant, could at any time before the receipt of these moneys by Warwick have revoked his authority, on the basis of its not being binding upon her as long as it was executory; but by permitting it to remain in full force until after the collection had been made and the funds applied to the payment of the debts of her husband, such payments became her payments, and she cannot now repudiate them. The difference between the executory contract of a married woman and one that is executed is illustrated in the

case of a bond and mortgage given by her to secure the debt of another person; the contract in the bond, being executory, cannot be enforced against her, but the conveyance by the mortgage being executed, her title can be foreclosed in equity, as has been frequently decided by the courts of this state.

The result therefore is, that inasmuch as the moneys in suit were received by Warwick and applied by him with the consent of the complainant to the payment of the debts of her husband, they cannot be reclaimed by the complainant.

The decree must be reversed, and the bill dismissed, with costs in both courts.

It is proper to say that the suit may not be a precedent; that the bill in this case should not have been entertained. The controversy was a purely legal one, and should have been tried in a court of law.

Decree unanimously reversed.

MARRIED WOMAN'S POWER TO CONTRACT, and bind her separate estate therefor: *Kantrowitz* v. *Prather*, 99 Am. Dec. 587, and extended note 598–610; *Habenicht* v. *Rawls*, 58 Am. Rep. 268; *Williams* v. *Hugenin*, 18 Id. 607.

WHETHER MARRIED WOMAN RENDERS HER SEPARATE PROPERTY LIABLE FOR HUSBAND'S DEBTS by allowing him to have use and control of it, see *Dean* v. *Bailey*, 99 Am. Dec. 533, and cases collected in note 536.

EXECUTORY CONTRACT MADE BY HUSBAND AND WIFE IN STATUTORY MODE, for sale of the wife's separate property, is valid and binding upon her: *Love* v. *Watkins*, 6 Am. Rep. 624.

LA FOY *v.* LA FOY.

[13 NEW JERSEY EQUITY, 206.]

DEBT OF DEVISEE TO TESTATOR CANNOT BE CHARGED ON LANDS DEVISED TO HIM by the testator, in the absence of language in the will making such debt a charge.

APPEAL from a decree of the court of chancery. The opinion states the case.

Philip W. Cross, for the appellants.

Charles T. Glenn, for the respondents.

By Court, VAN SYCKEL, J. The bill in this case was filed for the partition of the real estate of John B. M. de La Foy among his devisees. The only question that need be considered in this case is, whether the debt of a devisee to the testator can be charged on the lands devised to him in the absence of language in the will making such debt a charge.

The ground upon which an executor is permitted to retain, as against a legatee, so much of his legacy as will satisfy a debt due from the legatee to the testator is clearly stated in *Jeffs* v. *Wood*, 2 P. Wms. 128, where the master of the rolls says: "The legatee's demand is in respect of the testator's assets, without which the executor is not liable; and it is very just and equitable for the executor to say that the legatee has so much of the assets already in his own hands, and consequently is satisfied *pro tanto*."

In *Courtenay* v. *Williams*, 3 Hare, 539, 552, Vice-Chancellor Wigram says: "The executors may say to the legatee, 'We admit your right to the legacy; you have assets of the testator in your hands; pay your legacy *pro tanto* out of those assets.' Again, the executor might say, 'You ask for a portion of the assets of the testator; but you are yourself a debtor to testator's estate, and his assets are diminished *pro tanto* by your default; it is against conscience that you should take anything out of the estate until you have made good what you owe to it'; and the equity of a trustee to impound the interest of a *cestui que trust* in the trust find under such circumstances is clear."

The case of *Cherry* v. *Boultbee*, 4 Mylne & C. 442, shows how absolutely this doctrine rests on the fact that the legatee may be compelled to resort to the aid of the law to recover his legacy from one who is entitled to receive the debt the legatee owes to the testator. In that case, Lord Cottenham remarks: "It must be observed that the term 'set-off' is very inaccurately used in cases of this kind. In its proper use it is applicable only to mutual demands, debts, and credits. The right of an executor of a creditor to retain a sufficient part of a legacy given by the creditor to the debtor, to pay a debt due from him to the creditor's estate, is rather a right to pay out of the fund in hand than a right of set-off. Such right of payment, therefore, can only arise where there is a right to receive the debt so to be paid; and the legacy or fund so to be applied in payment of the debt must be payable by the person entitled to receive the debt."

Our own courts have placed the right of the executor to retain upon this equitable basis: *Snyder* v. *Warbasse*, 11 N. J. Eq. 463; *Brokaw* v. *Hudson*, 27 Id. 135.

The devisee of lands occupies no such relation to the executor as that which exists between legatee and executor. No act is necessary, on the part of the executor, to put the devisee

in full enjoyment of the estate devised. The opportunity, therefore, could not arise for the executor to retain the debt of the devisee to the testator out of any demand which the devisee might seek to enforce against the executor. If such a charge attaches against the land devised, it would be necessary for the executor to establish it by proceedings in which he is the actor. After diligent search, I have been unable to find a case in which an attempt has been made to charge a devise of lands with a debt due from the devisee to the testator, in the absence of language in the will manifesting the purpose of the testator to do so. My examination shows no occasion on which such a question has been propounded in a court of justice.

In the structure of the English law there is no foundation for such a doctrine.

By the common law of England, the real estate of a deceased person was not liable to answer even his own simple contract debts, no action being maintainable against the heir in respect of descended assets, except by creditors whose debts were constituted by an instrument under seal. It is so clearly contrary to the policy of the common law that it would occasion surprise if any authority could be found to support a charge like that set up against the devisee in this case.

In *Letson* v. *Letson*, 17 N. J. Eq. 103, the testator devised to Johnson Letson certain real estate in New Brunswick. By a codicil to his will the testator directed as follows: "I have loaned and advanced to my son, Johnson Letson, one thousand dollars, and have joined in a bond and mortgage to secure seventeen hundred dollars to James Conover of New Brunswick. I expect and direct my said son, Johnson, to pay both said sums of money in aid and release of my estate."

After the testator's death, Johnson Letson entered upon the lands devised to him, and conveyed them.

The complainant filed his bill to have the debt of the devisee declared a charge and encumbrance upon the land devised.

Chancellor Green declared "that the moneys directed in the codicil to be paid by the defendant are not made a charge upon the real estate devised to him. A *bona fide* purchaser of the land devised, without notice, cannot be affected by any equity subsisting between the executor of the estate and the devisee."

It did not even suggest itself to the mind of that eminent jurist that it might be claimed that the debt was a charge on

the lands devised where the testator did not express that intention in his will.

If such an encumbrance can be maintained, title could not be safely taken from a devisee of land. My understanding is, that it has uniformly been the practice of real estate lawyers in this state to pass the title, where the language of the will did not create any charge upon the land devised, without any inquiry into the state of accounts between the testator and his devisee.

In the absence of language in the testator's will to that effect, there is no authority for charging the devisee's debt upon land devised to him.

In my opinion the decree in this case should be reversed.

Decree unanimously reversed.

BEQUEST OF DEBT DUE FROM LEGATEE TO TESTATOR IS SUBJECT TO THE DEBTS OF THE TESTATOR, and the legatee shares in the residuary fund: *Cole* v. *Covington*, 41 Am. Rep. 458.

LEGACY, WHEN A CHARGE ON REALTY: *Montgomery* v. *McElroy*, 38 Am. Dec. 771; *Tower's Appropriation*, 42 Id. 319.

REYNOLDS *v.* STOCKTON.

[43 NEW JERSEY EQUITY, 211.]

DECREE WHICH IS ENTIRELY ASIDE OF ISSUE RAISED IN RECORD IS INVALID, and will be treated as a nullity, even in a collateral proceeding.

DECREE OR JUDGMENT WHICH IS NOT APPROPRIATE TO ANY PART OF MATTER IN CONTROVERSY before the court can have no force. The matter in controversy is that exclusively which is presented by the pleadings and the issue framed thereby.

DECREE IN NEW YORK WHICH ADJUDICATES MATTER NOT PRESENTED BY PLEADINGS nor within the issue can have no higher effect than a judgment rendered in the New Jersey courts under like conditions, and it must be treated as a nullity.

RECEIVER OF INSOLVENT CORPORATION APPOINTED IN NEW JERSEY TO ADMINISTER ASSETS THERE HAS NO POWER to transfer to a foreign jurisdiction any question touching the appropriation and distribution of such assets. He cannot thus deprive the court which appointed him of its authority over him and over the fund which he holds as its officer.

JUDGMENT OBTAINED IN NEW YORK, IN ABSENCE OF ANY ONE REPRESENTING ASSETS, cannot bind their administration in New Jersey, whatever force such judgment might have with respect to assets which may be found in New York.

APPEAL from a decree of the court of chancery. The facts appear in the opinion.

R. J. Moses, Jr., for the appellants.

F. W. Stevens, for the respondent.

By Court, VAN SYCKEL, J. The appellants in this proceeding commenced an action in February, 1879, in the supreme court of New York against the Hope Life Insurance Company, John F. Smyth, then superintendent of the insurance department of New York, Joel Parker, receiver, and the New Jersey Mutual Life Insurance Company. Joel Parker was then acting receiver of the last-mentioned company under appointment of the court of chancery of New Jersey, and also ancillary receiver under appointment by the supreme court of New York. It is admitted that the Hope company was not brought into court by process of summons or otherwise, and that no appearance to said suit was put in by said company.

The range and object of that suit, as presented by the pleadings, was to determine who was entitled to the fund deposited with the New York superintendent of insurance by the Hope company. The New Jersey company claimed it under its agreement to reinsure the Hope company. Joel Parker, as receiver, and the New Jersey company filed an answer in which that is the only issue made.

No amendment was subsequently made to the pleadings, and no further answer filed by said receiver or said company.

The case was referred, and on the 7th of March, 1885, a decree was made adjudging the relative interests of the parties in the deposit funds.

Before the decree was entered in New York, Joel Parker was succeeded by Robert F. Stockton as receiver in New Jersey, but he continued to be ancillary receiver in New York until 1886, when he was discharged there by an order of the supreme court, and directed to turn over the assets in his hands to the New Jersey receiver.

On the 11th of October, 1886, after the discharge of the receiver in New York, a further proceeding was taken in the aforesaid suit in New York, without in any wise amending the pleadings, and without further answer or appearance on the part of Parker, receiver, or the New Jersey company, in which it was adjudged that the plaintiff in said proceeding recover of Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company, the sum of $1,010,496.29.

This claim was presented to Robert F. Stockton, receiver of the New Jersey company, and by him rejected, on the ground

that the New York adjudication did not constitute legal proof of the alleged indebtedness. On appeal to the court of chancery, the action of the receiver was sustained, and the appellants dismissed without relief.

The question presented by the appeal to this court is, whether to the decree of the New York court the conclusive force and effect of a judgment must be accorded.

That question is distinctly presented in *Munday* v. *Vail*, 34 N. J. L. 418, where it is held by the supreme court of this state that a decree which is entirely aside of the issue raised in the record is invalid, and will be treated as a nullity, even in a collateral proceeding.

A decree or judgment which is not appropriate to any part of the matter in controversy before the court can have no force. The matter in controversy is that exclusively which is presented by the pleadings and the issue framed thereby.

The object of the New York suit was fully accomplished, so far as the pleadings disclosed its purpose, when the New York fund was disposed of. There was an entire absence of such specific allegations in the complaint as were necessary to put the receiver of the New Jersey company on his defense in respect to the state of the account between that company and the Hope company.

The decree in New York, having adjudicated a matter not presented by the pleadings nor within the issue, can have no higher effect than a judgment rendered in our own courts under like conditions. Under the authority of *Munday* v. *Vail*, *supra*, it must be treated as a nullity.

A further infirmity in the appellant's position is the fact that the New Jersey court had the exclusive right to administer and dispose of the assets which the receiver held in this state. The receiver had no power to transfer to a foreign jurisdiction any question touching the appropriation and distribution of such assets. He could not thus deprive the court which appointed him of its authority over him and over the fund which he held as its officer. If he could change the forum to New York, he would have been without restraint if he had selected the courts of Mexico or China. The issue made by the answer of Receiver Parker to the complaint in New York clearly restricts the inquiry in that case to the disposition of the New York fund. Over that subject the jurisdiction of the foreign court is not challenged.

It appears, also, that Parker was discharged as ancillary

receiver in New York, and also was discharged as receiver in New Jersey, before the judgment now set up was obtained. A judgment obtained in the absence of any one representing the assets cannot bind their administration here, whatever force it might have with respect to assets which may be found in New York.

In my opinion, the decree below should be affirmed, with costs.

Decree unanimously affirmed.

DECREE IN EQUITY SHOULD CONFORM TO CASE MADE OUT BY PLEADINGS: *Evans* v. *Gibson*, 77 Am. Dec. 565; complainant can recover only on the case made by his bill: *Converse* v. *Blumrich*, 90 Id. 230.

JUDGMENT IS CONCLUSIVE ON PARTIES only as to what was directly in issue in the case in which it was rendered: *Lord* v. *Chadbourne*, 66 Am. Dec. 290; and see *Ellis* v. *Clarke*, 70 Id. 603; *People* v. *Johnson*, 97 Id. 770.

FOREIGN JUDGMENT, HOW FAR CONCLUSIVE: *Jones* v. *Jones*, 2 Am. St. Rep. 447, and note; *McLaren* v. *Kehler*, 8 Am. Rep. 591; when a nullity: *Latimer* v. *Union Pac. R'y Co.*, 97 Am. Dec. 378.

NELSON *v.* BOUND BROOK MUT. FIRE INS. CO.

[43 NEW JERSEY EQUITY, 256.]

FIRE INSURANCE — INSURER NOT ENTITLED TO ASSIGNMENT OF MORTGAGE, WHEN. — An owner of lands, who held a policy of insurance on the buildings thereon, verbally agreed to sell the property to her two sons. One half of the consideration was to be paid in cash, or its equivalent, the balance to be secured by a mortgage on the property; and it was further stipulated that, upon the execution of the conveyance, the vendees should have an assignment of the policy to them as owners, and reassign it to her as collateral security upon her mortgage. The deed was given by the vendor, and the mortgage was also signed and acknowledged by the vendees, and by the wife of one of them, but the wife of the other not being present, the mortgage was left in the vendor's custody until the absent wife could be brought to sign it, when the balance of the purchase-money was to be adjusted, and the arrangement as to insurance completed. Before the parties again met, the buildings were burned. *Held*, that upon payment of the amount of the policy, the insurance company was not entitled by subrogation to an assignment of the mortgage.

APPEAL from a decree of the court of chancery. The facts appear in the opinion.

R. V. Lindabury, for the appellants.

Gaston and Bergen, for the respondent.

By Court, KNAPP, J. Mrs. Nelson, the appellant, took out from the respondent company a policy of insurance against loss by fire on certain buildings on the farm owned and occupied by her at the time. The buildings were burned, and the company paid to her the amount of the loss.

Before the destruction of the buildings, the appellant, Mrs. Nelson, by a verbal agreement with her two sons, bargained for a sale to them of the entire property for three thousand dollars, one half to be paid in cash or its equivalent, the balance to be secured to her by bond and mortgage on the property. It was further stipulated between them that, upon the execution of the conveyance, the vendees should have an assignment of the policy to them as owners, and reassign it to her as collateral security upon her mortgage. In the *interim* the policy should remain for their joint protection on the building, the vendees engaging to pay all subsequent assessments on the policy. No time was appointed for concluding the transaction, but the parties chancing to meet at the office of a conveyancer, had the deed and mortgage drawn. The deed was signed and acknowledged by the vendor, and left by the parties with the county clerk to be recorded. The mortgage was signed and acknowledged by the vendees and the wife of one of them, who was present, and its custody given to the vendor to hold until the absent wife could be brought to sign it, when the balance of the purchase-money was to be adjusted, and the insurance as arranged for effected in completion of the bargain. Before the parties met again, after the execution of the papers, the fire occurred. Upon paying the insurance money by the company, an assignment of this mortgage to it was formally demanded of Mrs. Nelson. She refused to assign it, and the respondents filed a bill praying subrogation to her rights under the mortgage, and that she be decreed to assign it to the company. The court below so decreed, and from that decree the defendants below appealed.

The policy which Mrs. Nelson held was the ordinary one insuring her as owner against loss by fire. It expressed no undertaking on her part to assign to the underwriters, in any event, the whole or any part of the property insured, or any interest in or security which she might hold against it. The respondent's right to such decree, not resting upon express contract, must be based upon special circumstances such as give it just claim to that advantage. To decree it when not

founded in conventional right is the ministration of a pure equity, and one claiming it must show that it is due to him, and is not unjust or inequitable to other parties in interest: *Kernochan* v. *Bowery Ins. Co.*, 17 N. Y. 428.

The respondent does not rely upon the terms of its contract to support its present claim, but bases it upon changes in the relation of the assured toward the property through the contract of sale, which it alleges create other rights and duties between the insurer and the insured, out of which comes this resulting equity. It is said that through the sale to her sons she ceased to be owner, and became mortgagee for part of the consideration, thereby cutting down her insurable interest as owner to that of a lien for the payment of her debt, and reducing the obligation of the insurer from an undertaking of absolute indemnity against loss on the property to a special indemnity against loss on her mortgage debt; that as an insurer of the interest of a mortgagee, the right to subrogation to the security arises on payment of the debt.

Conceding that a mortgagee, who, on his own behalf and for his own protection solely, takes out a policy to secure his mortgage debt, may be called upon to assign his security to the insurer who pays his debt on the occurrence of a loss, it becomes an essential fact for the complainant to establish, in maintenance of its theory, that Mrs. Nelson had changed her character as owner to that of mortgagee. If the treaty between herself and her sons for the conveyance of the property was at the time of the loss by fire in an incomplete and inchoate state,—a mere executory contract,—no steps in its progress toward final execution can be seized hold of to determine her real *status*. She remained, in legal contemplation, the owner until within the intention of the parties the contract became executed in all its essential terms. Until then, loss on the property in risk was her loss, and under the terms of the policy the company was bound to pay in discharge of its contract obligation.

The parties to the contract of sale appear to have been fully agreed upon the terms of their bargain. Those terms have already been recited in sufficient detail for our purposes, and they meet with no substantial contradiction in the evidence. The transaction was intended by the parties to be an entire one, and in their minds was not regarded as an executed agreement when the deed and mortgage were exchanged, nor was it to become so until the execution of the mortgage was

perfected as stipulated for, the balance of the consideration money paid and adjusted, and the building protected by insurance for the interest and benefit of both. The execution of the papers needed in the transfer of title was for the convenience of the parties who lived at a distance from each other; and it was between those whose relations suggest trust and confidence. What was done respecting the conveyance was not regarded by the parties as the conclusion of their bargain, nor was the bargain considered by them as attaining completion until the balance of the consideration should be paid and insurance effected. I think it is clear that at the time of the fire the treaty for the sale of the property, which on its execution would change Mrs. Nelson's rights as owner to those of mortgagee, was *in fieri*, and her ownership remained. This conclusion is not disturbed by the suggestion of counsel that the appellant, Mrs. Nelson, has a vendor's lien for the balance of the purchase-money, which she can enforce in equity against her vendees. In the contract to sell she did not contemplate any such reliance for payment. She bargained for cash, and the cancellation of notes held against her, which were the equivalent of cash; and this is a very different thing from a vendor's lien, if that be her right. This, instead of showing an executed agreement, tenders to her a means, through litigation with her vendees, for the enforcement of unperformed stipulations.

But if it be conceded that the transfer was complete, so as vest the title in the grantees in the deed, and to convert her interest in the lands to that of mortgagee, the case is not one in which subrogation can be claimed.

It is not a case where the insurer reserves in the provisions of his policy the right to an assignment of the mortgage upon payment of a loss, as in *Foster* v. *Van Reed*, 70 N. Y. 19; 26 Am. Rep. 544. There the right resting upon express contract cannot be defeated or impaired by any private arrangement beween the assured and the owner of the equity of redemption. Nor is it of that class of cases where a mortgagee insures his mortgage interest "at his own expense, upon his own motion, and for his sole benefit." In such cases, says Judge Folger, in *Excelsior Ins. Co.* v. *Royal Ins. Co.*, 55 N. Y. 343, 359, 14 Am. Rep. 271, "the insurer, in making compensation, is entitled to an assignment of the rights of the assured." The remarks made by the learned chancellor in *Sussex Ins. Co.* v. *Woodruff*, 26 N. J. L. 541, were in respect to

insurance of a like interest by the mortgagee without the knowledge or concurrence of the mortgagor.

Under a contract of insurance made by a mortgagee, entirely on his own behalf and at his own expense, for indemnity against loss by destruction of the pledge, the owner of the equity of redemption can have no interest, and payment of the loss does not go in satisfaction of the debt. Subrogation can in such case harm no one. And without it the mortgagee might collect his debt twice. The right does not rest on the relation of suretyship. Mr. Justice Bradley says: "Where a creditor effects insurance on property mortgaged or pledged to him as security for the payment of his debt, the insurers do not become sureties of the debt, nor do they acquire all the rights of sureties. They are insurers of a particular building only": *Insurance Company* v. *Stinson*, 103 U. S. 25.

If such were the true character of the insurer, it would place serious impediments in the way of contracts between mortgagor and mortgagee, in respect to insurance of the mortgaged premises, which are held to be entirely legitimate. The ordinary insurance clause in mortgages may be mentioned as an instance.

A more reasonable ground for subrogation in these cases lies in the fact that insurance by the mortgagee, such as gives the debtor no benefit of money recovered on a loss, would, without subrogation, convert what is designed as a contract of indemnity into a wager policy. The mortgagee could demand payment of the loss to the extent of his mortgage without reducing the mortgage debt. Public policy condemns such contracts.

But there is neither reason nor good policy in compelling a mortgagee to assign his security, where, through an arrangement betweed the mortgagor and mortgagee, insurance on the mortgaged premises is effected for their common benefit, although the policy be taken in the name of the mortgagee. Where a policy is so taken out, under the insurance clause in a mortgage, payment of a loss to the mortgagee inures to the benefit of the mortgagor, and it is immaterial, under such stipulation, in whose name the policy be procured: *Waring* v. *Loder*, 53 N. Y. 581, and cases cited.

A policy effected under such an agreement, in the name of the mortgagee, to secure the mortgaged premises against loss by fire will protect the mortgagor, and payment to the mortgagee *pro tanto* discharges the debt. Such an agreement be-

tween the mortgagor and mortgagee is not regarded as an infringement upon the rights of the underwriters. The mortgagee becomes bound to give the credit to his mortgage debtor. His right is not to withhold it, and subrogation is only to such rights as he has.

In Sheldon on Subrogation, section 235, it is said: "If the mortgagee has procured the insurance, though in his own name, at the request and expense and for the benefit of the mortgagor, as well as for his own protection, — though this is by a parol agreement unknown to the insurers, — the mortgagor will have the right, in case of loss, to have the avails of the policy applied for his relief towards the discharge of his indebtedness."

This statement of the rule is well supported by numerous cases cited by the author. *Kernochan* v. *Bowery Ins. Co.*, 17 N. Y. 428, *Hay* v. *Star Ins. Co.*, 77 Id. 235, 33 Am. Rep. 607, and *Clinton* v. *Hope Ins. Co.*, 45 N. Y. 454, fully support the rule as stated in the text.

In *Clinton* v. *Hope Ins. Co.*, just cited, it was applied to a state of facts in close similarity with the present case. The owner of the property had taken out a policy on buildings and personalty contained therein, and while it was running agreed to convey the property to a vendee, who paid part of the purchase-money. The vendor agreed to hold the policy for their mutual benefit, the vendee agreeing to return the vendor the unearned portion of the premium on the policy. The case, in one of its aspects, was considered by the court in the light of an executed sale; and the court denied the right of the insurer to subrogation to the vendor's claim for balance of purchase-money, because of the agreement in the contract of sale to hold the policy for their mutual benefit. The court say: "If, as between the parties to the contract of sale, the vendee was entitled to the benefit of the insurance moneys in case of loss, the defendant — the company — can assert no equity in hostility to that arrangement. The equity of the defendant is the equity of the vendors; and an arrangement between the vendors and vendee, in respect to the application of the proceeds of the insurance, did not violate any contract between the insurer and the insured. The defendant, on payment of the indemnity promised, simply performs his contract."

The rule above exemplified has the support of authority, and is, as I think, based upon good reason and sound policy.

The principle is not that the right of substitution arises where the underwriter pays loss on a policy of insurance effected by a mortgagee upon the mortgaged premises. The insurance contract imports no such equity in the insurer. If it be awarded to him, it is entirely in virtue of some train of circumstances that render the claim an equitable one.

The contract with Mrs. Nelson on the part of the company was an indemnity against loss in the destruction of the buildings for which the usual premium and obligation required by the company for such insurance was demanded and received. On this policy, unchanged in its terms, the loss was paid. Now, the respondent claims a different *status* from that assumed in its contract, and claims its liability to be of a different nature because of the new attitude which the insured assumed through her contract to sell. Yielding that to the respondent, certainly it must take its new position, not upon a partial view or selected part of her contract. When it puts itself on her agreement, it does and must accept it as a whole, because her rights under that agreement, and those of her vendees, are to be determined on the entire terms of it. Among these, she engaged to hold her policy for the joint protection of herself and her vendees, and the latter assumed to pay all subsequent assessments upon it.

She cannot, under her contract with him, refuse to allow the proceeds of the insurance to reduce, *pro tanto*, her claim against them, and her rights in this regard are the respondent's rights.

For these reasons, the decree below should be reversed, and the bill be ordered dismissed, with costs.

Decree unanimously reversed.

WHERE INSURED HAS EXECUTORY CONTRACT FOR SALE of the mortgaged premises at the time of the loss, the insurer, on payment of the loss, is not entitled to be subrogated to the rights of the insured, *pro tanto*, under the contract of sale: *Washington Fire Ins. Co.* v. *Kelly*, 3 Am. Rep. 149; compare *Springfield Fire Ins. Co.* v. *Allen*, 3 Id. 711; *Ulster County Savings Inst.* v. *Lake*, 29 Id. 115.

VOORHIS *v.* WESTERVELT.

[48 NEW JERSEY EQUITY, 642.]

COMMON LAW, IN ABSENCE OF STATUTORY REGULATION, ESTABLISHES liens in the order of priority of their acquisition, the first in order of time standing first in order of rank.

UNREGISTERED MORTGAGE EXECUTED BY ANCESTOR RETAINS ITS PRIORITY over a judgment recovered against his heir at law in the ancestor's lifetime, although the judgment creditor had no notice of the mortgage when his judgment was recovered.

REGISTRY LAW APPLIES ONLY IN CASES WHERE INTEREST OF SUBSEQUENT judgment creditor, mortgagee, or purchaser, at the time he acts, can be affected by want of notice of the unregistered mortgage. It was not intended to relate to those who have no concern in such mortgage when they acquire their rights.

UNRECORDED MORTGAGE GIVEN BY ANCESTOR IS DISPLACED by a judgment recovered against the heir at law after the ancestor's death; and a purchaser of the heir's estate at a sale under such judgment, if he has no notice of the mortgage, is a *bona fide* purchaser, and will take free from the lien of such mortgage.

APPEAL from a decree of the court of chancery. The opinion states the case.

J. Herbert Potts and Charles H. Voorhis, for the appellant.

T. C. Simonton, Jr., for the respondent.

By Court, VAN SYCKEL, J. Westervelt holds an unrecorded mortgage given to him by Henry H. Voorhis, who died, leaving Charles H. Voorhis, one of his heirs at law, surviving him.

In the lifetime of Henry H. Voorhis, Ida Voorhis recovered a judgment against Charles H. Voorhis.

The question is between this mortgagee and the judgment creditor, as to which is entitled to priority.

The statute (Rev., p. 706, sec. 22) provides that mortgages shall be void against a subsequent crediter or *bona fide* purchaser or mortgagee for valuable consideration not having notice thereof, unless such mortgage is recorded at or before the time of entering such judgment. In the absence of statutory regulation, the mortgage, it is conceded, is not displaced; the common law establishes liens in the order of priority of their acquisition.

Is the relation between these parties affected by the registry act?

The mortgage could not be void as against this judgment, because it was not recorded "at or before the entering of such judgment."

The judgment, when entered, was no lien whatever upon the mortgaged premises, and could not become an encumbrance thereon without the concurrence of a number of uncertain events, over which the judgment debtor had no control whatever, to wit, the death of the mortgagor intestate in the lifetime of the judgment debtor, without having previously conveyed the lands. Therefore the entering of the judgment did not and could not in any wise affect the mortgage, and the existence of the mortgage could not then in any wise concern the judgment creditor.

The judgment creditor, by entering his judgment, acquired no rights as against the mortgagor or mortgagee. The neglect to record, or the want of notice, in no way affected him. He was not within the protection of the act; he had no need to be. The position of the judgment creditor is established when he takes his judgment, and if it is not a judgment which is then a lien on the lands, the statute has no relation to it.

It is certainly not within the spirit of the registry law.

Earle v. *Fiske*, 103 Mass. 491, 494, gives the object of the registry act in this language: "The manifest purpose of our statute is that the apparent owner of record shall be considered as the true owner (so far as subsequent purchasers without notice to the contrary are concerned) notwithstanding any unrecorded previous alienation."

When the judgment was taken the mortgagor was owner. The plaintiff in the judgment, when entered, had no interest whatever in the condition of the title to these lands, or in knowing how the record stood.

If the judgment had been recovered after the title of Charles H. Voorhis accrued, the case would be entirely different. The *status* is fixed at the time of the entry of the judgment, and it is fixed by law, and not by the subsequent death of the ancestor. A conveyance, therefore, by the heir, or a judgment recovered against him, after his title vests, will displace an unrecorded mortgage given by the ancestor. The *bona fide* purchaser, in such case, and the judgment creditor, acquires his title from the apparent owner, and the state of the record will protect him.

I cannot see that it makes any difference whether the heir, after his title vests, executes the conveyance himself, or permits his estate in the lands to be transferred by a judicial sale under such a judgment as the one in question.

The purchaser under the judgment, if he has no notice of

the mortgage, is a *bona fide* purchaser within the language of the act.

This construction, I think, gives full effect to the letter and spirit of the statute, and protects all who are required to act upon it.

In my view, the registry law applies only in cases where the interest of the judgment creditor, mortgagee, or purchaser, at the time he acts, can be affected by want of notice of the unrecorded mortgage. It cannot be conceived that it was intended to relate to those who have no concern in such mortgage, when they acquire their rights.

The learned vice-chancellor, in his opinion in this case, says: "That, as a general rule, a judgment creditor can take nothing for the satisfaction of his debt which his debtor cannot himself sell and make a good title to as against his creditors; that the statute has changed this rule, and given a judgment creditor, in a certain contingency, a right to sell property for the satisfaction of his debt, which his debtor could not himself sell, and to sell the same free from the lien of a prior unregistered mortgage, executed thereon by his debtor. But in order to possess this right, he must be a judgment creditor of the person who executed the prior unregistered mortgage, and not a judgment creditor of some person who may, at some future time, after entry of his judgment, become the owner, by descent, of the mortgaged premises."

This qualification of the rule, "that the judgment creditor must be a judgment creditor of the person who executed the unregistered mortgage," is not accurate. It is obvious that a purchaser from the heir at law, after the inheritance falls to him, is, upon a just and reasonable interpretation, within the protection of the registry law, where the unregistered mortgage is executed by the ancestor. The principle must be the same where the purchaser of the heir's estate acquires title through a judicial sale, made under a judgment like the adversary judgment in this case. Otherwise, the record will furnish no protection to the purchaser from the heir at law of the descended estate, nor could title safely be taken from a devisee of land.

Vreeland v. *Clafflin*, 24 N. J. Eq. 313, is not in conflict. That case holds that where there is a conveyance to A by an unrecorded deed, and a judgment is subsequently recovered against A, the judgment creditor's lien attaches to the land, and is paramount to the title granted by A to B by a deed

prior in date to the judgment, but of which the judgment creditor has no notice by record or otherwise. This is strictly in consonance with the statute, which makes the deed to B void and of no effect as against the judgment. The title passed to A by his deed, and in virtue of the statute, presumably rested there, as between A and his creditor, in consequence of the failure to record the deed to B. The correctness of the decision may possibly be more apparent if we put in place of the judgment creditor a *bona fide* purchaser from A. The same construction must prevail in either case.

This court, in *Sanborn* v. *Adair*, 29 N. J. Eq. 338, 344, cited with approbation the statement of Chancellor Williamson, in *Losey* v. *Simpson*, 11 Id. 249, "that the whole object of the registry act is to protect subsequent purchasers and encumbrancers against previous conveyances which are not recorded."

This object is fully accomplished by extending the benefit of the statute to those who purchase from or acquire encumbrances against the heir at law, or the devisee, after the ancestor's death. They are subsequent purchasers and encumbrancers, and if they cannot rely upon the state of the record, a very large percentage of titles to real estate are rendered unstable and insecure.

But an encumbrancer against one who is neither the owner in fact nor the apparent owner of record is not a subsequent encumbrancer of the lands. He establishes his claim against the individual, but it has no relation to the real estate of a third person, and it can, as against the lands of such stranger to the lien, receive no aid or support from the registry laws.

It has been held in other states that a *bona fide* purchaser of real estate from an heir, after the ancestor's death, will hold the same against a prior unregistered deed from the ancestor: *Rupert* v. *Mark*, 15 Ill. 540; *Powers* v. *McFerran*, 2 Serg. & R. 44; *McCulloch* v. *Eudaly*, 3 Yerg. 346.

The effect of a sale by the law is, in this respect, the same as if made by the debtor himself: *Ellis* v. *Smith*, 10 Ga. 253; *Tucker* v. *Harris*, 13 Id. 1.

In *Harlan* v. *Seaton*, 18 B. Mon. 312, the court of appeals of Kentucky decided that the protection of the statute of 1796 to purchasers for a valuable consideration without notice, against an unrecorded deed of the grantor, extends only to purchasers from the grantor himself, and not to purchasers from his heirs or devisees. The court, however, distinctly says "that heirs

at law are as much the apparent owners of the land as the grantor was in his lifetime, and the protection of innocent purchasers being the object of the act, it would seem to be just and reasonable, and consistent with legislative intent, to give it a construction which would operate to remedy the whole evil." But because it had become, by the previous decisions, an established rule in the transfer of real estate, the doctrine of prior cases in that state was adhered to.

In my opinion, the decree below should be affirmed, with costs.

Decree unanimously affirmed.

PRIORITY IN RECORDING CONVEYANCES OF REAL ESTATE PROTECTS only innocent and *bona fide* purchasers and holders: *Mitchell* v. *Aten*, 1 Am. St. Rep. 231; and see *Portis* v. *Hill*, 98 Am. Dec. 481; *Hunter* v. *Watson*, 73 Id. 543, and note.

REGISTRY OF MORTGAGE, WHEN RECORD IS NOTICE: *Pringle* v. *Dunn*, 19 Am. Rep. 772.

RECORDED QUITCLAIM DEED, PRIORITY: See *Cutler* v. *James*, 54 Am. Rep. 603; *Thorn* v. *Newsom*, 53 Id. 747; *Snow* v. *Lake*, 51 Id. 625; *Fox* v. *Hall*, 41 Id. 316; *Taylor* v. *Harrison*, 26 Id. 304; *Brown* v. *Banner etc. Coal Co.*, 37 Id. 105.

RECORDED PURCHASE-MONEY MORTGAGE, PRIORITY: *Turk* v. *Funk*, 30 Am. Rep. 771; *Stewart* v. *Smith*, 1 Am. St. Rep. 651, and cases in note 653.

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

SPIES *v.* PEOPLE.

[122 ILLINOIS, 1.]

DISTINCTION BETWEEN ACCESSARIES BEFORE THE FACT AND PRINCIPALS is abolished by the statutes of Illinois.

ACCESSARIES BEFORE THE FACT MAY BE INDICTED AND PUNISHED AS PRINCIPALS, under the statutes of Illinois.

THOSE WHO ADVISE, ENCOURAGE, AID, OR ABET THE KILLING OF ANOTHER are as guilty as though they took his life with their own hands.

ORDINARY LAW OF CONSPIRACY IS APPLICABLE TO PERSONS who have formed a common purpose and are united in a common design to aid and encourage the murder of another.

THE INTERNATIONAL WORKINGMEN'S ASSOCIATION OF CHICAGO WAS AN UNLAWFUL CONSPIRACY. Its purpose was unlawful, because it included a social revolution, by which the right of individuals to own property should be destroyed, and war should be made upon the police and militia as the defenders and protectors of the right of property. Its methods were also unlawful, because they involved the arming and drilling of groups of men, in violation of the laws of the state.

EVIDENCE. — ACTS AND DECLARATIONS OF ONE OF SEVERAL PERSONS who have combined to commit a crime, if done or made in furtherance of the common design, are, in contemplation of law, the acts and declarations of all.

A CONSPIRACY TO COMMIT A CRIME MAY BE CONSUMMATED, and the conspirators become guilty thereof, although the plan is not executed in exact accordance with the original conception. Hence, if A hire B to shoot C at a certain hotel, but C, seeing B enter another hotel on the same night, shoots him there, A is guilty of aiding, abetting, advising, and encouraging the shooting of C.

PROOF OF CONSPIRACY. — COMMON DESIGN IS THE ESSENCE of the charge of conspiracy; but it is not necessary to prove that the defendants came together, and actually agreed in terms to have that design, and to pursue

it by common means. If it be proved that they pursued, by their acts, the same object, often by the same means, one performing one part and another another part of the same, so as to complete it, with a view to the attainment of the same object, a jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object.

THE JURY HAVE A RIGHT TO DRAW FROM PROVEN CIRCUMSTANCES SUCH CONCLUSIONS as are natural and reasonable.

THE INTENTIONS OF MEN CAN ONLY BE DETERMINED from their acts.

MURDER IS THE UNLAWFUL KILLING OF A HUMAN BEING in the peace of the people, with malice aforethought, either express or implied.

MALICE IS ALWAYS PRESUMED, where one person deliberately injures another. It is the deliberation with which an act is performed that gives it character. It is the opposite of an act performed under uncontrollable passion, which prevents all deliberation or cool reflection in forming a purpose.

MALICE AND DELIBERATION ARE PROPERLY INFERRED against one who manufactures a bomb or other implement with the intent that it shall be used in killing another person, although he does not know by nor upon what particular individual it may be used, if the intent is that it shall be so used by some member of a particular class of persons upon some member of another class of persons. When a person of the latter class is killed, the guilt is the same as though he had been specially designated by name as the victim.

MURDER IN EXECUTION OF COMMON DESIGN. — If persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all are equally principals in the murder, though at the time of the act some of them were at such a distance as to be out of view, if the murder is in furtherance of the common design.

PERSONS ENTERING INTO A CONSPIRACY, PREVIOUSLY FORMED, are deemed in law parties to all acts done by other parties, before or afterwards, in furtherance of the common design. It is therefore unnecessary to prove that a person accused of conspiracy to commit a crime was one of those with whom the conspiracy originated, or that he met with the others during the process of the concoction.

ONE WHO INFLAMES THE MINDS OF OTHERS, AND INDUCES THEM by violent means to do an illegal act, is guilty of such act, though he takes no other part therein. If he contemplated the result, he is answerable, though it is produced in a manner different from that contemplated by him. If he awoke into action an indiscriminate power, he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what he might have foreseen would be the understanding, he is responsible.

ONE INFLAMING THE MINDS OF OTHERS THROUGH THE NEWSPAPER ORGAN of a society to which they belong is as answerable in a criminal prosecution as though he had so inflamed them by spoken words.

WHERE PUBLICATIONS MADE IN A NEWSPAPER ADVISING AND INCITING persons to commit a crime are almost immediately succeeded by the commission of such crime, the jury are at liberty to consider such publications in connection with all the other facts and circumstances of the case, and as a part of those facts and circumstances, with a view of determining whether the persons responsible for the publications did or did not join in a conspiracy to commit such crime.

TO IMPEACH A WITNESS BY PROOF THAT ANOTHER WITNESS WOULD NOT BELIEVE THE FORMER on oath, the latter must first testify that he knows the former's reputation among his neighbors for truth and veracity, and that such reputation is bad. The unwillingness to believe under oath must result from such bad reputation. Hence the material fact to be proved is that the reputation is bad.

JURY MUST DETERMINE WHETHER REPUTATION OF WITNESS FOR TRUTH AND VERACITY IS BAD, when witnesses of equal standing and credibility give conflicting testimony on the subject.

A CONSPIRACY IS a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose by criminal or unlawful means. The accused need not be an original contriver of the mischief. He may become a partaker in it by joining the others while it is being executed. If he concurs, no evidence of an agreement to concur is necessary.

A CONSPIRACY MAY BE PROVED BY CIRCUMSTANTIAL EVIDENCE; in other words, the joint assent of minds, like all other parts of a criminal case, may be established as an inference of the jury from other facts proved.

ONE WHO LENDS HIMSELF TO THE EXECUTION OF A CONSPIRACY BY PARTICIPATING IN A JOINT ATTACK on others, in the course of which he uses a deadly weapon without known effect, but one of his fellow-conspirators kills one of the persons attacked by throwing a bomb, is as guilty of murder as is the thrower of the bomb, because all the conspirators had a murderous intent, and were all using deadly weapons in pursuance of a common design to destroy life.

ONE WHO PERSONALLY TAKES NO PART IN AN OFFENSE IS NEVERTHELESS GUILTY of it if he purposely excited another to commit it, as where he, by haranguing people, inflamed them to a riot or other crime.

IF ONE MAKES SPEECHES TO EXCITE AND INFLAME OTHERS THERE ASSEMBLED to the number of three or more, with a view to incite them to acts of violence, and if that same meeting is so connected in point of circumstances with a subsequent riot that the latter cannot reasonably be severed from the incitement used, he is guilty of riot, though not present when it occurs. It is a question for the jury whether the riot that took place was so connected with the inflammatory language that they cannot reasonably be separated by time or other circumstances.

ANY ACT OF ONE OF SEVERAL CONSPIRATORS IN THE PROSECUTION OF THEIR ENTERPRISE is considered the act of all.

A PRINCIPAL IN THE CRIME OF MURDER NEED NOT BE SPECIFICALLY A PARTY TO THE KILLING, if he is present and consenting to the assemblage by which it is perpetrated in pursuance of the common design.

ONE MAY BE GUILTY OF A WRONG WHICH HE DID NOT SPECIFICALLY INTEND, if it came naturally or even accidentally through some other specific or a general evil purpose. Therefore, when persons combine to do an unlawful thing, if the act of one proceeding or growing out of the common plan terminates in a criminal result, though not the particular result meant, all are liable.

ABSENCE OF SPECIAL MALICE AGAINST THE PERSON SLAIN, or of deliberate intention to hurt him, if the killing was committed in the prosecution of an original unlawful purpose, will not exonerate any of the conspirators from the guilt of him who gave the fatal blow.

EACH CONSPIRATOR IS RESPONSIBLE FOR THE MEANS EMPLOYED BY ANY OF HIS FELLOW-CONSPIRATORS in accomplishing the unlawful purpose in

which all are engaged, where the means to be used in the furtherance of such purpose are not previously specifically agreed upon or understood.

EACH CONSPIRATOR IS PRESUMED TO HAVE ASSENTED TO THE DOING OF WHATEVER would reasonably or probably be necessary to accomplish the objects of the conspiracy, even to the taking of life, where the objects of the conspiracy are to do such unlawful acts as will probably result in the unlawful taking of human life.

THE INTERNATIONAL WORKINGMEN'S ASSOCIATION OF CHICAGO WAS AN ILLEGAL ORGANIZATION, engaged in making bombs and drilling with arms for the unlawful purpose of attacking the police if the latter should assume to do their duty in the protection of the public peace. Its members were conspirators, and by their act of conspiring together they jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design.

EVIDENCE. — THE UTTERANCES OF NEWSPAPERS AND SPEAKERS ARE ADMISSIBLE IN EVIDENCE against persons on trial for murder, to show the intentions and purposes of a society, when it appears that such persons were members of such society, and that such speakers and newspapers were the spokesmen and organs thereof.

EVIDENCE. — THE ACTS AND DECLARATIONS OF PARTIES TO A GENERAL CONSPIRACY are admissible in evidence, if they precede and lead up to a special plot or conspiracy in the prosecution of which a crime is committed.

EVIDENCE. — A BOOK MAY BE ADMITTED IN EVIDENCE against defendants on trial for murder of a policeman, when it appears that it was circulated by an organization of which they were members, and was one of the methods by which the organization instructed and advised its members to get ready for the murder of the police. When the leaders of the organization thus used the book, they adopted it as a manual of tactics, and it became a book of their written advice and instruction to their followers; and was competent evidence to establish the purposes and objects which they had in view, and the methods by which they proposed to accomplish those objects.

CROSS-EXAMINATION. — A LETTER WRITTEN TO AND RECEIVED BY A DEFENDANT on trial for murder is properly received in evidence against him, as part of his cross-examination as a witness on his own behalf, if it tends to test the sincerity of a claim made by him on his direct examination that he had no serious or unlawful object in view in keeping dynamite and other articles, or to show that he and its author were engaged in the business of supplying dynamite to discontented laboring men.

EVIDENCE. — AN UNANSWERED LETTER IS ADMISSIBLE IN EVIDENCE AGAINST THE PERSON RECEIVING IT, and to whom it was addressed, if it appears to have been invited by him, and to have been written in response to some previous communication by him.

ON CROSS-EXAMINATION OF PERSON ON TRIAL FOR MURDER, who has offered himself as a witness to disprove the charge made against him, he cannot refuse to answer a question on the ground that by so doing he will criminate himself. To affect his credibility he may also be asked whether he has been concerned in other crimes, part of the same system.

EVIDENCE. — BOMBS, AND CANS CONTAINING DYNAMITE AND PREPARED WITH CONTRIVANCES for exploding it, are receivable in evidence against persons charged with murder committed by throwing a bomb among policemen, in pursuance of a conspiracy, as specimens of the kind of weapons the

defendants and their associates were preparing, and as showing the malice and evil heart which the intended use of such weapons indicated. The jury have a right to see them for the further purpose of comparing them with the descriptions of the bomb by which the deceased was killed, with a view of determining whether it was made by any of the defendants. Bombs and cans found buried near one of the designated meeting-places of the conspirators are also admissible for the purpose of showing the nature and character of the conspiracy, and its connection with the events which transpired on the night appointed for the meeting. Though the bombs and cans are not shown to have been placed by the defendants at the place where they were found, it was for the jury to say whether, under all the circumstances, any others than the members of the conspiracy had undertaken to make such weapons or knew anything about them.

THE DECLARATIONS OF A CONSPIRATOR WHICH MAY BE RECEIVED IN EVIDENCE AGAINST HIS CO-CONSPIRATORS must be restricted to such as are made in furtherance of the common design. Declarations which are merely narrative as to what has been or will be done are competent evidence only against those by or in whose presence they were made.

THAT THE ACTS AND DECLARATIONS OF ONE CONSPIRATOR WERE RECEIVED IN EVIDENCE AGAINST THE OTHERS before proof of the conspiracy or of their connection with it was made is immaterial, if, from the whole evidence received at the trial, such conspiracy and their connection with it is shown to have existed. The order in which the evidence may be received is largely within the discretion of the trial judge. The prosecutor may either prove the conspiracy, which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. The term "acts" as here used includes written correspondence and other papers relative to the main design.

IDENTITY OF PERSON WHO THREW A BOMB BY WHICH ANOTHER WAS KILLED need not be established on a trial for murder, if it sufficiently appears that he and the defendants on trial were all members of a conspiracy to unlawfully resist the officers of the law, and that he threw such bomb in pursuance of the conspiracy and in furtherance of the common object.

MEMBERSHIP IN A CONSPIRACY MAY BE PROVED WITHOUT SHOWING THE NAME OR DESCRIPTION OF THE ALLEGED MEMBER. Hence, where several persons are on trial for murder, and the act causing the death of the deceased was committed by another person, with whom it is claimed that the defendants conspired to commit such murder, the fact that he, though his name and personal description are unknown, was a member of such conspiracy, is sufficiently established by evidence tending to show that he threw a bomb made by an agent of the conspiracy, obtained from a place where only a member could have obtained it, and at a time when no one but a member would have sought it; and that he threw it at a meeting appointed by the conspiracy, from the midst of a company of persons belonging to the conspiracy, upon the happening of a contingency provided for, and as part of an attack planned by the conspiracy.

ONE MAY BE ACCESSARY TO AN UNKNOWN PRINCIPAL in the perpetration of a crime. If the principal felon is unknown, the indictment of the accessary may state it accordingly. If there are two counts in the indictment, one charging the principal to be known and the other charging him to be unknown, it is sufficient if either is proved.

CHARGING ACCESSARY AS PRINCIPAL. — Under the statutes of Illinois, one who, not being present aiding, abetting, or assisting, hath advised, encouraged, aided, or abetted the perpetration of a crime, may be indicted and punished as a principal. The indictment against him need not say anything about his having abetted either a known or an unknown principal.

THE INSTRUCTIONS GIVEN TO THE JURY MUST BE CONSIDERED AS A WHOLE. If the appellate court can see that an instruction, although not stating the law correctly, is qualified by others, so that the jury were not likely to be misled, the error will be obviated. This rule does not contravene the rule that, in a criminal case, material error in one instruction calculated to mislead is not cured by a subsequent contradictory instruction.

GUILT OF MURDER ARISING FROM GENERAL ADVICE. — If the defendants, as a means of bringing about a social revolution, and as a part of a larger conspiracy to effect such revolution, also conspired to excite classes of workingmen in a city to sedition, tumult, and riot, and to the use of deadly weapons and taking of human life, and for the purpose of producing such tumult, riot, use of weapons, and taking of life, advised and encouraged such classes by newspaper articles and speeches to murder the authorities of the city, and a murder of a policeman resulted from such advice, then the defendants are responsible therefor, and guilty of the crime of murder.

REASONABLE DOUBT. — When instructing jurors upon the subject of reasonable doubt, it is not error for the court to say to them: "You are not at liberty to disbelieve as jurors if from the evidence you believe as men."

UNDER A STATUTE DECLARING THAT JURIES IN ALL CRIMINAL CASES SHALL BE JUDGES OF THE LAW AND FACT, the court may tell the jurors that if they can say upon their oaths that they know the law better than the court, they have the right to do so, but that before saying this, upon their oaths, it is their duty to assure themselves that they are not acting from caprice or prejudice, and to reflect whether from their study and experience they are better qualified to judge of the law than the court.

A CONSPIRACY TO BRING ABOUT A CHANGE OF GOVERNMENT by peaceful means if possible, but if necessary, by a resort to force, is unlawful.

ANARCHISTS. — IT IS NOT ERROR TO REFUSE TO INSTRUCT A JURY, that "it cannot be material that the defendants, or some of them, are or may be socialists, communists, or anarchists," when the defendants are on trial for murder, and there is evidence tending to show that such murder was committed in the prosecution of a conspiracy to resist, and if necessary to kill, members of the police or militia, as the representatives of law and government. The fact that defendants were anarchists may properly be considered by the jury, in connection with all the other circumstances of the case, with a view of showing what connection, if any, the defendants had with the conspiracy, and what were their motives in joining it.

THROWING A DYNAMITE BOMB INTO A BODY OF POLICEMEN CANNOT BE EXCUSED on the ground that they have, in excess of their authority, given an order for persons there assembled to disperse, and the bomb-thrower, being a member of the assemblage, adopts this mode of resisting the invasion of his rights.

INSTRUCTIONS AS TO THE FORM OF VERDICT CANNOT BE COMPLAINED OF, unless the counsel for the accused prepared an instruction, indicating such form as they deemed to be correct, and asked the trial court to give it, where the court, at the request of defendants, instructed the jury that, under an indictment for murder, the accused might be found guilty of manslaughter, and that it was their duty to so find, if they believed that the defendants, or any of them, were guilty of manslaughter.

JURY TRIAL. — BY ACCEPTING A JUROR WHILE THE ACCUSED HAVE UNUSED PEREMPTORY CHALLENGES, they are estopped from complaining that he was not impartial.

JURY TRIAL. — ERROR OF THE COURT IN OVERRULING A CHALLENGE FOR CAUSE will not be reviewed in the appellate court, if the defendant, having any unused peremptory challenges at the time, uses them to exclude from the jury the person so challenged for cause, though during the subsequent progress of the cause all the defendant's peremptory challenges are exhausted before a full jury is finally obtained. No objections will be considered, unless made to jurors who tried the case.

JURY TRIAL. — A JUROR IS NOT DISQUALIFIED, under the statutes of Illinois, to try a criminal case because he has an opinion, based upon rumor or newspaper statements, if he has expressed no opinion concerning the truth of such rumors or statements, and swears that he can fairly and impartially render a verdict in the case, in accordance with the law and the evidence.

JURY TRIAL. — STATUTE IS NOT UNCONSTITUTIONAL which declares that, in any trial of a criminal cause, the fact that a person called as a juror has formed an opinion or impression, based upon rumor or newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall, upon oath, state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement. Such statute does not conflict with a provision of the constitution guaranteeing to every accused person a speedy, public trial, by an impartial jury. It merely tends to secure intelligence in the jury-box, and to exclude dense ignorance therefrom.

JURY TRIAL. — JURORS ARE NOT DISQUALIFIED BY HAVING A PREJUDICE AGAINST SOCIALISTS, COMMUNISTS, AND ANARCHISTS, because such prejudice is merely a prejudice against crime; and a prejudice against a crime, or against mean actions or dishonesty, does not render one incompetent to act as a juror.

PREJUDICE AGAINST COMMUNISM OR ANARCHISM DOES NOT RENDER A JUROR incapable of fairly and impartially trying the issue, whether the crime of murder has been committed by persons who are claimed to be communists and anarchists.

JURY TRIAL. — THE SAME NUMBER OF PEREMPTORY CHALLENGES MUST BE CONCEDED TO THE STATE of Illinois, under its statutes, as to the defendants, where several are being jointly tried for the commission of the same crime.

GRANTING SEPARATE TRIALS TO PERSONS JOINTLY INDICTED IS IN THE DISCRETION of the court, and an order refusing such trial will not be reviewed.

INDICTMENT against the plaintiffs in error for the murder of Matthias J. Degan, on May 4, 1886, at Chicago, Illinois. The trial was conducted in the criminal court of Cook County, before Hon. Joseph E. Gary, judge, presiding. The evidence connecting each defendant with the crime is stated in the opinion of the court. The articles published in various newspapers, and the speeches of the defendants at different times, are also referred to in the opinion, and a synopsis of their contents given, so far as material. The platform of the International Association of Workingmen was as follows:—

"The Declaration of Independence declares, when a long train of abuses and usurpation, pursuing invariably the same object, evinces a design to reduce them (the people) under absolute despotism, it is their right—it is their duty—to throw off such government, and to provide new guards for their future security. Are we not too much governed, and is it not the time to practice this thought of Jefferson? Is our government anything but a conspiracy of the privileged classes against the people? Fellow-laborers, read the following declaration, which we issue in your interest, for humanity and progress:—

"The present order of society is based upon the spoliation of the non-property by the property owners. The capitalists buy the labor of the poor for wages, at the mere cost of living, taking all the surplus of labor. By machinery constantly reducing the volume of human labor, produces constantly increasing quantities of goods, whereby the competition of labor is increasing, and its price being reduced. Thus while the poor are increasingly deprived the opportunities of advancement, the rich grow richer through increasing robbery. Only by rare and accidental opportunities can the poor become rich; avarice increases with wealth, and capitalists compete for the spoliation of the masses. In this struggle, the moderately wealthy succumb, while monopolists flourish, concentrating in their hands entire branches of industry, trade, and commerce. Industrial and commercial crises follow, which force the wretchedness of the non-property owners to the highest point. Statistics of the United States show that, after deducting raw material, interest on capital, etc., property-owners claim five eighths, and allow to the laborers but three eighths of the residue. The result of the present system is recurring over-production, while the increasing elim-

ination of labor from the process of production brings the impoverishment of an increasing percentage on non-property owners, 'who are driven into crime, vagabondage, prostitution, suicide, starvation, and manifold ruin. This system is unjust, insane, and murderous.' Therefore, those who suffer under it, and do not wish to be responsible for its continuance, ought to strive for its destruction by all means, and with their utmost energy. 'In its place is to be put the true order of society. This can be brought about only when all instruments of property—all capital produced by labor—has been transformed into common property, for thus only is the possibility of spoliation cut off. Only by the impossibility of accumulating private capital can every one be compelled to work who claims the right to live. Neither lordship nor servitude will thereafter exist. This system would result further, that no one would need to work more than a few hours a day, and yet every reasonable want of society would be satisfied. In this way, time and opportunity are also given for opening to all the people the possibility of the highest imaginable culture.'

"Opposed to such a system are the political organizations of the capitalists, whether monarchies or republics. States are in the hands of property-owners, with no other apparent end than to maintain the disorder of the present day. The laws turn their sharp points against the laboring people, and, so far as they seem otherwise, are evaded by the ruling class. The school exists for the offspring of the rich, while the children of the poor receive scarcely an elementary education, and this directed to promote conceit, prejudice, servility,—anything but intelligence. By reference to a fictitious heaven, the church seeks to make the masses forget the loss of paradise on earth, while the press takes care to confuse the public mind. These institutions aim to prevent the people from reaching intelligence, being under the sway of the capitalist class. The laborers can look for aid from no outside source in their fight against the existing system, but must achieve deliverance through their own exertions. Hitherto, no privileged class have relinquished tyranny, nor will the capitalists of to-day forego their privilege and authority without compulsion. This is evidenced by the brutal resistance always manifested by the middle classes against all efforts by the laboring classes for their advancement.

"It is therefore evident that the fight must be of a revolu-

tionary character,—that wage conflicts cannot lead to the goal. Every reform in favor of the laboring classes involves a curtailment of the privileges of the rich, to which we cannot expect their assent. 'The ruling classes will not voluntarily relinquish their prerogatives, and will make no concession to us. Under all these circumstances, there is only one remedy left,—force.' Our ancestors of 1776 have taught us that resistance to tyrants is justifiable, and have left us an immortal example. By force they freed themselves from foreign oppressors, 'and through force their descendants must free themselves from domestic oppression.' Therefore, it is your right and duty to arm, says Jefferson. Agitation to organize, organizations for the purpose of rebellion,—this is the course if the workingmen would rid themselves of their chains. And since all governments combine in their policy of oppression, it is evident that the victory of the laboring population can be confidently expected only when the wage-workers along the whole line of capitalistic society inaugurate the decisive combats simultaneously. Hence the necessity for international affiliation and the organization of the International Association of Workingmen. Our platform is simple and clear: —

"1. Destruction of existing class domination, through inexorable revolution and international activity.

"2. The building of a free society on communistic organizations or production.

"3. Free exchange of equivalent products through the productive organization, without jobbing and profit making.

"4. Organization of the educational system upon non-religious and scientific and equal basis for both sexes.

"5. Equal rights for all, without distinction of sex or race.

"6. The regulation of public affairs through agreements between the independent communes and confederacies."

The letter from Johann Most to the defendant Spies, which was offered and received in evidence, when translated into English, was as follows: —

"*Dear Spies,*—Are you sure that the letter from the Hocking Valley was not written by a detective? In a week I will go to Pittsburg, and I have an inclination to go also to the Hocking Valley. For the present I send you some printed matter. There Sch. 'H' also existed but on paper. I told you this some months ago. On the other hand, I am in a condition to furnish 'medicine,' and the 'genuine' article at

that. Directions for use are perhaps not needed with these people. Moreover, they were recently published in the 'Fr.' The appliances I can also send. Now, if you consider the address of Buchtell thoroughly reliable, I will ship twenty or twenty-five pounds. But how? Is there an express line to the place, or is there another way possible? Paulus, the Great, seems to delight in hopping around in the swamps of the N. Y. V. Z. like a blown-up (bloated) frog. His tirades excite general detestation. He has made himself immensely ridiculous. The main thing is only that the fellow cannot smuggle any more rotten elements into the newspaper company than are already in it. In this regard, the caution is important to be on the minute. The organization here is no better nor worse than formerly. Our group has about the strength of the North Side group in Chicago,—and then, besides this, we have also the soc. rev. 6. 1, the Austrian League and the Bohemian League,—so to say, three more groups. Finally, it is easily seen that our influence with the trade organizations is steadily growing. We insert our meetings in the Fr., and cannot notice that they are worse attended than at the time when we got through, weekly, $1.50 to $2 into the mouth of the N. Y. V. Z. Don't forget to put yourself into communication with Drury in reference to the English organ. He will surely work with you much and well. Such a paper is more necessary as to truth. This, indeed, is getting more miserable and confused from issue to issue, and in general is whistling from the last hole. Inclosed is a fly-leaf, which recently appeared at Emden, and is perhaps adapted for reprint. Greeting to Schwab, Rau, and to you.

"Yours, JOHANN MOST.

"P. S.—To Buchtell I will, of course, write for the present only in general terms.

"A. Spies, No. 107 Fifth Avenue, Chicago, Illinois."

The postal card, as translated, reads as follows:—

"L. S. *Dear Spies*,—I had scarcely mailed my letter yesterday, when the telegraph brought news from H. M. One does not know whether to rejoice over that or not. The advance is in itself elevating. Sad is the circumstance that it will remain local, and, therefore, might not have a result. At any rate, these people make a better impression than the foolish voters on this and the other side of the ocean. Greetings and a shake. Yours, J. M."

The only instructions to the jury considered by the appellate court were the following:—

"4. The court further instructs the jury, as a matter of law, that if they believe, from the evidence in this case, beyond a reasonable doubt, that the defendants, or any of them, conspired and agreed together, or with others, to overthrow the law by force, or to unlawfully resist the officers of the law, and if they further believe, from the evidence, beyond a reasonable doubt, that in pursuance of such conspiracy, and in furtherance of the common object, a bomb was thrown by a member of such conspiracy at the time, and that Matthias J. Degan was killed, then such of the defendants that the jury believe, from the evidence, beyond a reasonable doubt, to have been parties to such conspiracy, are guilty of murder, whether present at the killing or not, and whether the identity of the person throwing the bomb be established or not.

"5. If the jury believe, from the evidence, beyond a reasonable doubt, that there was in existence in this county and state a conspiracy to overthrow the existing order of society, and to bring about social revolution by force, or to destroy the legal authorities of this city, county, or state by force, and that the defendants, or any of them, were parties to such conspiracy, and that Degan was killed in the manner described in the indictment, that he was killed by a bomb, and that the bomb was thrown by a party to the conspiracy, and in furtherance of the objects of the conspiracy, then any of the defendants who were members of such conspiracy at that time are in this case guilty of murder,—and that, too, although the jury may further believe, from the evidence, that the time and place for the bringing about of such revolution or the destruction of such authorities had not been definitely agreed upon by the conspirators, but was left to them and the exigencies of time, or to the judgment of any of the co-conspirators.

"5½. If these defendants, or any two or more of them, conspired together, with or not with any other person or persons, to excite the people or classes of the people of this city to sedition, tumult, and riot, to use deadly weapons against and take the lives of other persons, as a means to carry their designs and purposes into effect, and in pursuance of such conspiracy, and in furtherance of its objects, any of the persons so conspiring, publicly, by print or speech, advised or encouraged the commission of murder, without designating time, place, or occasion at which it should be done, and in pursuance of and

induced by such advice or encouragement, murder was committed, then all of such conspirators are guilty of such murder, whether the person who perpetrated such murder can be identified or not. If such murder was committed in pursuance of such advice or encouragement, and was induced thereby, it does not matter what change, if any, in the order or condition of society, or what, if any, advantage to themselves or others, the conspirators proposed as the result of their conspiracy; nor does it matter whether such advice and encouragement had been frequent and long-continued or not, except in determining whether the perpetrator was or was not acting in pursuance of such advice or encouragement, and was or was not induced thereby to commit the murder. If there was such conspiracy as in this instruction is recited, such advice or encouragement was given, and murder committed in pursuance of and induced thereby, then all such conspirators are guilty of murder. Nor does it matter if there was such a conspiracy, how impracticable or impossible of success its end and aims were, nor how foolish nor ill-arranged were the plans for its execution, except as bearing upon the question whether there was or was not such conspiracy.

"6. The court instructs the jury that a conspiracy may be established by circumstantial evidence, the same as any other fact, and that such evidence is legal and competent for that purpose. So as to whether an act which was committed was done by a member of the conspiracy may be established by circumstantial evidence, whether the identity of the individual who committed the act be established or not; and, also, whether an act done was in pursuance of the common design may be ascertained by the same class of evidence; and if the jury believe, from the evidence in this case, beyond a reasonable doubt, that the defendants, or any of them, conspired and agreed together, or with others, to overthrow the law by force, or destroy the legal authorities of this city, county, or state by force, and that in furtherance of the common design, and by a member of such conspiracy, Matthias J. Degan was killed, then these defendants, if any, whom the jury believe, from the evidence, beyond a reasonable doubt, were parties to such conspiracy, are guilty of the murder of Matthias J. Degan, whether the identity of the individual doing the killing be established or not, or whether such defendants were present at the time of the killing or not."

"11. The rule of law which clothes every person accused of

crime with the presumption of innocence, and imposes upon the state the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is in fact guilty of crime to escape, but is a humane provision of law intended, so far as human agencies can, to guard against the danger of any innocent person being unjustly punished.

"12. The court instructs the jury, as a matter of law, that in considering the case the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

"13. The court further instructs the jury, as a matter of law, that the doubt which the juror is allowed to retain on his own mind, and under the influence of which he should frame a verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror, in view of the consequences of his verdict, is not a reasonable doubt, and a juror is not allowed to create sources or materials of doubt by resorting to trivial and fanciful suppositions and remote conjectures as to possible states of fact differing from that established by the evidence. You are not at liberty to disbelieve as jurors, if, from the evidence, you believe as men. Your oath imposes on you no obligation to doubt, where no doubt would exist if no oath had been administered.

"13½. The court instructs the jury that they are the judges of the law, as well as the facts, in this case, and if they can say, upon their oaths, that they know the law better than the court itself, they have the right to do so; but before assuming so solemn a responsibility, they should be assured that they are not acting from caprice or prejudice, that they are not controlled by their will or their wishes, but from a deep and confident conviction that the court is wrong and that they are right. Before saying this, upon their oaths, it is their duty to reflect whether, from their study and experience, they are better qualified to judge of the law than the court. If,

under all the circumstances, they are prepared to say that the court is wrong in its exposition of the law, the statute has given them that right.

"14. In this case the jury may, as in their judgment the evidence warrants, find any or all of the defendants guilty or not, or all of them not guilty; and if, in their judgment, the evidence warrants, they may, in case they find the defendants or any of them guilty, fix the same penalty for all the defendants found guilty, or different penalties for the different defendants found guilty. In case they find the defendants, or any of them, guilty of murder, they should fix the penalty either at death, or at imprisonment in the penitentiary for life, or at imprisonment in the penitentiary for a term of any number of years, not less than fourteen."

The defendants excepted to the refusal of the court to give the following instructions:—

"3. The court instructs the jury that, in order to convict these defendants, they must not only find that they entered into an illegal conspiracy, and that the Haymarket meeting was an unlawful assembly in aid of said conspiracy, but that in addition thereto the bomb by which Officer Degan lost his life was cast by a member of said conspiracy in aid of the common design, or by a person outside of said conspiracy, aided and advised by all or some one of these defendants; but, in any event, should you find such a conspiracy, from the evidence, to have been in existence, any one or more of these defendants not found, beyond a reasonable doubt, to have been a member thereof, and who is or are not proved, beyond a reasonable doubt, to have been present at the Haymarket meeting, or who, if present, did not knowingly counsel, aid, or abet the throwing of the bomb by which Officer Degan lost his life, such defendant or defendants you are bound to acquit."

"8. If the jury believe, from the evidence, that the defendants, or any one of them, entered into a conspiracy to bring about a change of government for the amelioration of the condition of the working classes, by peaceable means, if possible, but, if necessary, to resort to force for that purpose, and that, in addition thereto, in pursuance of that object, the Haymarket meeting was assembled by such conspirator or conspirators to discuss the best means to right the grievances of the working classes, without any intention of doing any unlawful act on that occasion, and, while so assembled, the bomb by which Officer Degan lost his life was thrown by a person outside of

said conspiracy, and without the knowledge and approval of the defendant or defendants so found to have entered into said conspiracy, then, and in that case, the court instructs the jury that they are bound to acquit the defendants.

"9. The court instructs the jury that it is not enough to find that the defendants unlawfully conspired to overthrow the present form of government, and that the Haymarket meeting was an unlawful assembly, called by these defendants in furtherance of that conspiracy, but you must find, in addition thereto, that the bomb by which Officer Degan lost his life was thrown by a member of said conspiracy, in aid of the common design; or, if you should find that it was thrown by a person not proved, beyond a reasonable doubt, to have been a member of said conspiracy, then you must find that these defendants knowingly aided and abetted or advised such bomb-thrower to do the act; otherwise you are bound to acquit them."

"11. The court further instructs the jury that unless you find, from the evidence, beyond all reasonable doubt, that there was a conspiracy existing, to which the defendants or some of them were parties, and that the act resulting in the death of Matthias J. Degan was done by somebody who was a party to said conspiracy, and in pursuance of the common design of said conspiracy, you must find the defendants not guilty, unless the evidence convinces you beyond all reasonable doubt that the defendants, or any of them, personally committed the act resulting in the death of Matthias J. Degan, as charged in the indictment, or that the defendants, or any of them, stood by and aided, abetted, or assisted, or not being present, had advised, aided, encouraged, or abetted the perpetration of the crime charged in the indictment, and then you should find guilty only those defendants as to whom the evidence satisfies you, beyond all reasonable doubt, that they thus committed or aided in the commission of the crime charged in the indictment."

"13. The court further instructs the jury that, under the constitution of this state, it is the right of the people to assemble, in a peaceable manner, to consult for what they believe to be the common good, and that so long as such meeting is peaceably conducted, orderly, and not tending to riot or a breach of the peace, no official or authority has or can have any legal right to attempt the dispersal thereof in a forcible manner. Such attempt, if made, would be unwarranted and

illegal, and might legally be resisted with such necessary and reasonable degree of force as to prevent the consummation of such dispersal. If the jury believe, from the evidence in this cause, that the meeting of May 4, 1886, was called for a legal purpose, and, at the time it was ordered to disperse by the police, was being conducted in an orderly and peaceable manner, and was about peaceably to disperse, and that the defendants, or those participating in said meeting had, in connection therewith, no illegal or felonious purpose or design, then the order for the dispersal thereof was unauthorized, illegal, and in violation of the rights of said assembly and of the people who were then gathered. And if the jury further believe, from the evidence, that the meeting was a quiet and orderly meeting, lawfully convened, and that the order for its dispersal was unauthorized and illegal, under the provisions of the constitution of this state referred to, and that upon such order being given, some person in said gathering, without the knowledge, aid, counsel, procurement, encouragement, or abetting of the defendants, or any of them, then or theretofore given, and solely because of his own passion, fear, hatred, malice, or ill-will, or in pursuance of his view of the right of self-defense, threw a bomb among the police, wherefrom resulted the murder or homicide charged in the indictment, then the defendants would not be liable for the results of such bomb, and your verdict should be not guilty."

"18. Although certain of the defendants may have advised the use of force in opposition to the legally constituted authorities, or the overthrow of the laws of the land, yet, unless the jury can find, beyond all reasonable doubt, that they specifically threw the bomb which killed Degan, or aided, advised, counseled, assisted, or encouraged said act, or the doing of some illegal act, or the accomplishment of some act by illegal means, in the furtherance of which said bomb was thrown, you should return said defendants not guilty."

"22. The fact, if such is the fact, that the defendant Neebe circulated or distributed or handled a few copies of the so-called Revenge Circular, and, while doing so said, substantially, 'Six workmen have been killed at McCormick's, last night, by the police; perhaps the time will come when it may go the other way,' is not of itself sufficient to connect him with the killing of Degan; nor is the fact that he had in his house a red flag, a gun, a revolver, and a sword, sufficient, even when taken together with the other statement contained in

this instruction, to connect said Neebe with the act which resulted in the death of Degan, as charged in this indictment.

"23. There has not been introduced any evidence in this case to either show that the defendant Neebe, by any declaration, either spoken or written, has advised or encouraged the use of violence, or the doing of any act in any way connected with the offense at the Haymarket, at which Degan was killed, nor is there any evidence that he was engaged at any time in any conspiracy to do any unlawful act, or the doing of any act in an unlawful manner, in the furtherance of which said Degan was killed; and therefore the state has not established any case as against the defendant Neebe, and you are therefore instructed to render a verdict of not guilty as to him.

"24. The jury are instructed to return a verdict of not guilty as to the defendant Neebe."

The court of its own motion instructed the jury as follows:—

"The statute requires that instructions by the court to the jury shall be in writing, and only relate to the law of the case. The practice under the statute is, that the counsel prepare, on each side, a set of instructions, and present them to the court, and if approved, to be read by the court as the law of the case. It may happen, by reason of the great number presented, and the hurry and confusion of passing on them in the midst of the trial, with a large audience to keep in order, that there may be some apparent inconsistency in them, but if they are carefully scrutinized, such inconsistencies will probably disappear. In any event, however, the gist and pith of all is, that if advice and encouragement to murder was given, if murder was done in pursuance of and materially induced by such advice and encouragement, then those who gave such advice and encouragement are guilty of the murder. Unless the evidence, either direct or circumstantial, or both, proves the guilt of one or more of the defendants upon this principle so fully that there is no reasonable doubt of it, your duty to them requires you to acquit them. If it does so prove, then your duty to the state requires you to convict whoever is so proved guilty. The case of each defendant should be considered with the same care and scrutiny as if he alone were on trial. If a conspiracy, having violence and murder as its object, is fully proved, then the acts and declarations of each conspirator, in furtherance of the conspiracy, are the acts and declarations of each one of the conspirators. But the declara-

tions of any conspirator before or after the 4th of May, which are merely narrative as to what had been or would be done, and not made to aid in carrying into effect the object of the conspiracy, are only evidence against the one who made them. What are the facts and what is the truth, the jury must determine from the evidence, and from that alone. If there are any unguarded expressions in any of the instructions, which seem to assume the existence of any facts, or to be any intimations as to what is proved, all such expressions must be disregarded, and the evidence only looked to to determine the facts."

The following was the instruction given as to the form of the verdict:—

"If all of the defendants are found guilty, the form of the verdict will be: 'We, the jury, find the defendants guilty of murder in manner and form as charged in the indictment, and fix the penalty ——.' If all are found not guilty, the form of the verdict will be: 'We, the jury, find the defendants not guilty.' If part of the defendants are found guilty and part not guilty, the form of the verdict will be: 'We, the jury, find the defendant or defendants [naming him or them] not guilty; we find the defendant or defendants [naming him or them] guilty of murder in manner and form as charged in the indictment, and fix the penalty ——.'"

The defendants having been convicted, prosecuted a writ of error.

Leonard Swett, W. P. Black, and Solomon and Zeisler, for the plaintiffs in error.

George Hunt, attorney-general, Julius S. Grinnell, state's attorney, Francis W. Walker and Edmund Furthman, assistant state's attorneys, and George C. Ingham, for the people.

By Court, MAGRUDER, J. This case comes before us by writ of error to the criminal court of Cook County. The writ has been made a *supersedeas*.

Plaintiffs in error were tried in the summer of 1886 for the murder of Matthias J. Degan, on May 4, 1886, in the city of Chicago, Cook County, Illinois. On August 20, 1886, the jury returned a verdict finding the defendants August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel, and Louis Lingg guilty of murder, and fixing death as the penalty. By the same verdict they

also found Oscar W. Neebe guilty of murder, and fixed the penalty at imprisonment in the penitentiary for fifteen years.

About the first day of May, 1886, the workingmen of Chicago and of other industrial centers in the United States were greatly excited upon the subject of inducing their employers to reduce the time during which they should be required to labor on each day to eight hours. In the midst of the excitement, growing out of this eight-hour movement, as it was called, a meeting was held on the evening of May 4, 1886, at the Haymarket, on Randolph Street, in the West division of the city of Chicago. This meeting was addressed by the defendants Spies, Parsons, and Fielden. While the latter was making the closing speech, and at some point of time between ten and half-past ten o'clock in the evening, several companies of policemen, numbering 180 men, marched into the crowd from their station on Desplaines Street, and ordered the meeting to disperse. As soon as the order was given, some one threw among the policemen a dynamite bomb, which struck Degan, who was one of the police-officers, and killed him. As a result of the throwing of the bomb and of the firing of pistol-shots, which immediately succeeded the throwing of the bomb, six policemen, besides Degan, were killed, and sixty more were seriously wounded.

It is undisputed that the bomb was thrown, and that it caused the death of Degan. It is conceded that no one of the convicted defendants threw the bomb with his own hands. Plaintiffs in error are charged with being accessaries before the fact. There are sixty-nine counts in the indictment. Some of the counts charged that the eight defendants abovenamed, being present, aided, abetted, and assisted in the throwing of the bomb; others, that, not being present, aiding, abetting, or assisting, they advised, encouraged, aided, and abetted such throwing. Some of the counts charge that said defendants advised, encouraged, aided, and abetted one Rudolph Schnaubelt in the perpetration of the crime; others, that they advised, encouraged, aided, and abetted an unknown person in the perpetration thereof.

The Illinois statute upon this subject is as follows (c. 38, div. 2, sec. 2, 3):—

"SEC. 2. An accessary is he who stands by, and aids, abets, or assists, or who, not being present, aiding, abetting, or assisting, hath advised, encouraged, aided, or abetted the perpetration of the crime. He who thus aids, abets, assists, advises,

or encourages shall be considered as principal, and punished accordingly.

"SEC. 3. Every such accessary, when a crime is committed within or without this state by his aid or procurement in this state, may be indicted and convicted at the same time as the principal, or before or after his conviction, and whether the principal is convicted or amenable to justice or not, and punished as principal."

This statute abolishes the distinction between accessaries before the fact and principals; by it all accessaries before the fact are made principals. As the acts of the principal are thus made the acts of the accessary, the latter may be charged as having done the acts himself, and may be indicted and punished accordingly: *Baxter* v. *People*, 3 Gilm. 368; *Dempsey* v. *People*, 47 Ill. 323.

If, therefore, the defendants advised, encouraged, aided, or abetted the killing of Degan, they are as guilty as though they took his life with their own hands. If any of them stood by and aided, abetted, or assisted in the throwing of the bomb, those of them who did so are as guilty as though they threw it themselves.

It is charged that the defendants formed a common purpose, and were united in a common design to aid and encourage the murder of the policemen among whom the bomb was thrown. If they combined to accomplish such murder by concerted action, the ordinary law of conspiracy is applicable, and the acts and declarations of one of them, done in furtherance of the common design, are, in contemplation of law, the acts and declarations of all. This prosecution, however, is not for conspiracy as a substantive crime. Proof of conspiracy is only proper so far as it may tend to show a common design to encourage the murder charged against the prisoners. It may be introduced for the purpose of establishing the position of the members of the combination as accessaries to the crime of murder.

The questions which thus present themselves at the threshold of the case are these: Did the defendants have a common purpose or design to advise, encourage, aid, or abet the murder of the police? Did they combine together and with others with a view to carrying that purpose or design into effect? Did they, or either or any of them, do such acts or make such declarations, in furtherance of the common purpose

or design, as did actually have the effect of encouraging, aiding, or abetting the crime in question?

The solution of these questions involves an examination of the evidence.

The first inquiry which naturally suggests itself is, Who made the bomb which killed Degan?

1. The bomb was round. Zeller, a witness for the defense, says of it, as he saw it going through the air: "It seems to me it was more round and about as big as a base-ball." Taylor, another witness for the defense, says: "I saw the bomb enough to know that it was a round bomb."

There is much evidence in the record as to the different kinds of bombs, and as to the mode of their construction. The simplest and cheapest form is what is known as the gas-pipe bomb, the mode of constructing which is hereafter explained. The gas-pipe bomb is the one which the ordinary, unskilled laborer would be most apt to make, if he desired to use such a weapon.

The round bombs, however, are more expensive, and their construction is more difficult, and more liable to discovery. Such a bomb consists of two semi-globes, which, if made of iron, must be obtained at a foundry, or if made of zinc or other material, require the use of brass or clay molds, and facilities for melting the metals entering into their composition. The semi-globes must be fastened together by solder or by bolts. Holes must be drilled for the insertion of the bolts, and also for the insertion of the caps and fuse. Care must be taken to fill in the dynamite properly, and to insert the fulminating cap into the dynamite, and the fuse into the cap. The construction of such bombs requires time and skill, and involves considerable expense in the purchase of materials.

2. The bomb thrown at the Haymarket was exploded by means of a projecting fuse, ignited before leaving the hand by a match or a lighted cigar. This abundantly appears from the evidence of those who saw it before it fell. One witness says it was like a fire-cracker in the air; another, that "it was like a burnt-out match that was lit yet"; another, that it was a "streak of fire" in the air; still another calls it "a little tail of fire quivering in the air."

As we understand the evidence in regard to the mode of constructing a round bomb with a fuse, the method is as follows: When the two semi-globular shells are fastened together, and the dynamite is filled in through an opening made for

that purpose, a fuse six or eight inches long is inserted in a detonating cap; the cap is pinched so as to hold the fuse; the cap is then inserted about two thirds of its length into the dynamite through the opening, and five or six inches of fuse are left to project outside of the bomb.

There are bombs which do not have the projecting fuse. When explosion is desired from a distance, a wire and electric battery are used. A primer bomb has a percussion cap on each side, so that when it is thrown "whichever side strikes will explode the cap." Another kind of bomb is described in the testimony as having the appearance of a fruit-can, containing a glass tube, connected with the top by a screw, and so fixed as to explode when thrown against a hard substance.

The bomb with a projecting fuse of six or eight inches is made to be thrown into a crowd of men, and when "only a few minutes are desired to get away," and "only so much fuse is required as can burn in the interval of throwing." When the fuse projects in the manner indicated, it is necessary to apply a light externally to the end of the fuse before the bomb is thrown.

3. The shell of the bomb which exploded was of composite manufacture. Pieces of the shell were taken by the physicians from the body of Degan and from the body of Officer Murphy, who had fifteen shell-wounds. These pieces were subjected to chemical examination, and were found to be composed of tin and lead, with traces of antimony, iron, and zinc. The Degan piece contained slightly more tin than the Murphy piece, but the ingredients of the two pieces were exactly the same. The chemists who made the analysis here referred to, and who have given their testimony in relation to the same, swear that there is no commercial substance which has the same composition as these pieces of shell. Commercial lead, they say, never contains tin. Solder is composed of tin and lead; but the proportion of tin in solder to the amount of lead therein is so different from the proportions of those ingredients in the pieces of shell so analyzed that the latter could not have been made of solder. Experiments also demonstrated that the exploded bomb could not have been made out of old lead pipe that had been plugged or mended with solder. The proportions of lead and tin in such case are vastly different from their proportions in the pieces of the bomb which were subjected to examination. In the latter, lead was the basis of

the preparation; but tin, or some other metal containing tin, was mixed with the lead.

4. The bomb, which exploded, had upon it a small iron nut. One Michael Hahn was standing on the northwest corner of Desplaines and Randolph streets when the bomb exploded at the Haymarket meeting, and was struck by a part of it. On the morning of May 5, 1886, a surgeon extracted from his body an iron nut, threaded in the circular opening through its center, so as to fit upon the screw end of a bolt, of which it had evidently been a part. The discovery of this nut points unerringly to the conclusion that the two semi-globular halves of the exploded bomb had been fastened together by a bolt, and had not been soldered together. The evidence shows that soldering was the usual method of fastening together the two halves of the round bomb.

The four characteristics of the exploded bomb which have been thus indicated were found to exist in the bombs which were made by the defendant Louis Lingg.

1. Many of the bombs made by Lingg were round or globular in form. The defendant Lingg came to this country for the first time in the summer of 1885, from some place in Germany. In August of that year he became acquainted with William Seliger, a German carpenter, who had resided in America three years and a half. Two weeks before Christmas, 1885, he went to board and room at Seliger's house, No. 442 Sedgwick Street, in the North division of the city of Chicago. More than six weeks before May 1, 1886, he brought a bomb to the house and said he was going to make bombs. Some six weeks before that date, or about the middle of March, 1886, he brought dynamite there. He had three different kinds of dynamite. He had no regular employment for about four weeks prior to May 1, 1886. During this time he was experimenting with dynamite, and with round and long or gas-pipe bombs. He exploded the latter in the woods north of the city, and "says he put one right in the crotch of a tree and slit it all up." During a period of six weeks prior to May 1, 1886, he was at work from time to time making semi-globular bomb-shells, and was often assisted in this work by Seliger and by two men named Thielen and Hermann or Heumann. These semi-globes appear to have been all finished before May 4, 1886, and of course were intended for round bombs, the only kind in the construction of which such shells were used. After Lingg's arrest, round bombs were found in a trunk in

his room and under a sidewalk on Sigel Street, where he is proven to have hidden them, and in the possession or under the control of one Lehmann, to whom he is proven to have given them. It thus appears that the exploded bomb corresponded in shape and form with many of the bombs made by Lingg.

2. The bombs made by Lingg had the projecting fuse so as to be exploded by the external application of fire.

On April 30, 1886, being the Friday before the day of the Haymarket meeting, Lingg brought to Seliger's house a large wooden box, about three feet long, from sixteen to eighteen inches high, and from sixteen to eighteen inches broad, inside of which was a tin box, containing dynamite. On the next Tuesday (May 4, 1886), he was occupied, during the afternoon and until after seven o'clock in the evening, in filling this dynamite into gas-pipes and globular shells, using a flat piece of wood, which he had made for that purpose. He was assisted in his labors by a number of persons, and among these were Seliger, Thielen, and Hermann, already mentioned, and two men, named Huebner and Munsenberg or Muensenberger, the latter of whom was probably the blacksmith hereafter referred to. Upwards of fifty bombs were finished that afternoon, and the work on them would appear to have been continued up to or beyond the hour on that evening for which the Haymarket meeting had been called, as hereafter stated. The rooms in Seliger's house, which were used by Lingg and his assistants for their work, are spoken of as the front room and the bedroom. The witness Lehmann visited these rooms twice on Tuesday afternoon in company with a countryman of his, a Prussian named Smideke, who went there with him to buy a revolver. His first visit was made at five o'clock in the afternoon, at which time he saw there Lingg, Seliger, Huebner, and a person of whom he speaks as follows: "One whose name I did not know; it is said that he is a blacksmith." They were in the bedroom, and each had a cloth tied around his face, but the witness "could not precisely see what they were doing."

The second visit was made to the rooms at seven o'clock in the evening, and lasted about ten minutes. At this time Lehmann did not get into the bedroom, but they were busy there as at the first visit. He saw Huebner working at some coil of fuse, which looked like strings or white cord; he was cutting it into pieces; they were putting fuse into caps in the front room. During one of these visits, Lingg gave to Lehmann a small leather hand-satchel or trunk, which the latter

took home and placed in his woodshed, and at three o'clock next morning, after he had learned of the destruction wrought at the Haymarket, carried "away to the prairie," there burying its contents. The satchel contained a tin box or can nearly full of dynamite, and three round bombs, some caps, and two coils of fuse. Another circumstance may be mentioned in this connection. After ten o'clock on Tuesday night, when Lingg and Seliger were on Larrabee Street, just south of North Avenue, in the North division of the city, a patrol wagon passed them, which was manned with policemen, and had been summoned to the Haymarket by a call through the telephone. Lingg proposed to throw among the policemen in the wagon a bomb, which he had about his person, and for the purpose of exploding it demanded a light of Seliger, who was smoking a cigar at the time. It thus appears that the bombs made by Lingg were made with the projecting fuse, and so corresponded with the second feature of the exploded bomb, as already noticed.

3. The shells of the round bombs made by Lingg were constructed of composite metal.

Their correspondence in this particular with the shell of the exploded bomb tends very strongly to show that the same hand which made them also made the exploded bomb. Lingg, Seliger, Thielen, and Hermann were frequently engaged in "melting and casting" in Seliger's kitchen during the six weeks before May 1, 1886. Lingg melted lead or some other metal in a ladle on the kitchen stove. A pan is identified as one which was used by him in making the semi-globes found in his round bombs. He also made use for such purpose of clay molds constructed by himself. One of these clay molds could only be used twice.

Pieces of bomb-shells proven to have been made by Lingg in the manner and with the materials here indicated were subjected to chemical analysis. They were composed of a certain percentage of tin, and the remainder was lead, with traces of antimony, iron, and zinc. Out of four bombs examined, the percentage of tin in the different bombs varied slightly in three, and in the fourth considerably more than in the other three. As a result of the chemical analysis, the piece of shell taken from Degan's body, and the pieces of the shells discovered in Lingg's possession after his arrest, were shown to be composed of exactly the same ingredients.

After May 4th there were found in Lingg's room a metal

cup, a cold-chisel, a file, shells, loaded cartridges, "metal, and also some lead," "some babbitt-metal, some sheets of lead," bolts, pieces of metal in a Japan dinner-box with four dynamite gas-pipe bombs, two loaded and two empty, a Remington rifle, a round dynamite bomb, loaded, two pieces of solder, a blast-hammer, and a smaller pointed hammer, a couple of iron bits and drills, a two-quart pail with sawdust in the bottom, a tin quart-basin with fuse and sawdust or dynamite in it, two long cartridges of dynamite, and some fuse already fixed, fuse about four inches long and caps, a big coil of fuse in the trunk, a piece of block tin, a piece of candlestick. Babbitt-metal is an alloy of copper, tin, and zinc. Many of the articles found were chemically analyzed. The candlestick or toy proved, upon analysis, to contain tin, lead, antimony, zinc, and a trace of copper. All the ingredients necessary to make up the composite material, out of which the exploded shell was constructed, were thus discovered to be in Lingg's possession.

The shell of the globular bomb, if entirely of lead, would be soft and yielding, and on this account would fail to furnish that degree of resistance to the dynamite which appears from the evidence to be necessary, in order to make the explosion effective. It was evidently for this reason that some other substance, such as tin, was combined with the lead to give the shell a firmer consistence and make its effect more deadly. With the same end in view, nails and wire, as will be hereafter seen, were recommended by the defendant Engel to be put around the gas-pipe bombs.

It appears that of the bombs made by Lingg, which were analyzed, each differed slightly from the others in the amount of tin, though all contained the same ingredients. It also appears that the two halves of the same bomb would differ somewhat in the proportions of the metal present, and this accounts for the fact that the piece from Degan's body contained a very little more tin than the piece from Murphy's body, each evidently coming from a different half of the bomb.

These slight differences are such as would naturally be expected when shells were made with the rude materials with which Lingg worked, melting his metals in a small ladle on a kitchen stove, casting half a shell at a time, making use of clay molds made by himself, each one of which could only be used twice.

4. The semi-globular halves of each round bomb made by

Lingg were fastened together by a bolt, upon one end of which was screwed a small iron nut, showing a remarkable correspondence between the Lingg bombs and the exploded bomb in the fourth peculiarity of the latter, which has been heretofore mentioned.

On the morning of Tuesday, May 4th, Lingg left Seliger's house to go to a meeting on the West Side, and did not return until one o'clock in the afternoon. Before leaving, he instructed Seliger to go to work at the bombs, remarking that they would be taken away that day. He gave Seliger a bolt, and said "that he had not enough of those bolts," and told him to go to Clybourne Avenue and "get there some that he had already spoken to the man about." About fifty of the bolts were procured in accordance with the directions thus given. Seliger was engaged in the forenoon in drilling holes in the shells already on hand for the bolts to pass through. He was chided by Lingg, upon the latter's return, for having progressed so slowly with the work, and was informed that they would "have to work very diligently during the afternoon."

The evidence shows that the bolt used by Lingg was a metallic pin running through the bomb, that a head was formed on one end of this pin, and on the other end there was cut a thread, upon which was screwed a movable piece called a nut, the head at one end and the nut at the other holding the two semi-globes together. These bolts were found in the bombs afterwards taken from the possession of Lingg, and proven by the undisputed testimony in the case to have been made by him.

The nut taken from the body of Hahn, and which was a part of the exploded bomb, was applied to the threaded end of one of the bolts taken from a bomb made by Lingg, and was found to fit it exactly. This cannot be regarded otherwise than as a circumstance of very grave significance.

In view of the considerations thus far presented, and of others which will suggest themselves as the examination proceeds, we think the jury were warranted in believing from the evidence that the bomb which killed Degan was one of the bombs made by the defendant Lingg.

This conclusion receives indorsement from the fact that the making of such bombs as have been described is a new, unusual, and dangerous occupation. There are no bomb manufactories. A bomb is not an article which can be bought in

the market, like a revolver. He who would use such a weapon must make it himself.

According to the evidence in this record, dynamite is composed of nitro-glycerine and clay or sawdust; it must be handled with care; it will explode if subjected to too great a degree of heat; it should not be exposed to the rays of the sun, or placed too near the fire; if kept for any length of time, it must be stored with caution, for instance, it is recommended that it be wrapped in oil-paper, placed in a box of sawdust, and buried in the cellar; when, in handling it, it gets upon the skin, headache is produced; if its dangerous gases are inhaled, frightful pains in the head will be the result. Moreover, information as to its peculiarities and as to the safest mode of handling it is limited, and to some extent not accessible.

For these reasons, so hazardous a business as filling bomb-shells with dynamite will not usually be engaged in. Hence, when a murder is the result of the explosion of a dynamite bomb, and about the time of the murder a man is found making such bombs near the scene of the explosion, his responsibility for the crime, viewed in connection with other criminating circumstances which may exist, will be a more natural inference than where some more common weapon of destruction has been used.

The next question to be considered is, Why did the defendant Lingg make the bomb which killed Degan?

In order to satisfactorily answer this question, it becomes necessary to examine the character and purposes of an association with which all the defendants in this case were connected.

The record shows the existence of an organization known as the International Workingmen's Association, or the International Arbeiter Association, generally called the Internationals, and sometimes designated for brevity as the I. A. A.

The platform, or declaration of principles, adopted by this organization was published by a certain bureau of information and by certain newspapers, called the Alarm and the Arbeiter Zeitung, which are more particularly referred to hereafter. It appeared in all the issues of the latter paper during the months of February, March, and April, 1886. It is too long for insertion here. It urges that the present system, under which property is owned by individuals, should be destroyed, and that all capital which has been produced by labor

should be transformed into common property. It says: "It is only when capital is made common and indivisible that all can be made to partake fully and freely of the fruits of common activity; only by the impossibility of acquiring individual (private) capital can every one be compelled to work who claims the right to live." It charges that the government, the law, the schools, the churches, the press, are in the pay and under the sway of the property-owning and capitalistic classes, and that the laboring classes must achieve their deliverance through their own strength.

This International platform thus addresses the workingmen: "As in former times no privileged class ever relinquished its tyranny, no more can we take it for granted that the capitalists of the present day will forego their privileges and their authority without compulsion. . . . . It is therefore self-evident that the fight of proletarianism (the laboring classes) against the bourgeoise (the middle classes) must have a violent revolutionary character, and that mere wage conflicts can never lead to the goal. We could show, by numerous illustrations, that all attempts which have been made in the past to do away with the existing monstrous social system through peaceable means, for example, through the ballot-box, have been entirely useless, and will be so in the future. . . . . We know, therefore, that the ruling classes will not voluntarily relinquish their prerogative, and will make no concessions to us. Under all these circumstances, there is only one remedy left,—force! . . . . Therefore, it is your right, it is your duty, says Jefferson, to arm yourselves. Agitation, with a view to organization, organizations for the purpose of rebellion; herein is indicated in a few words the way which workingmen must take, if they would rid themselves of their chains."

It is here admitted that the property of each individual in the community could not be taken away from him and put into a common fund to be divided among all the members of the community without a resort to revolution and force. The way to the result sought to be reached by the International platform here referred to leads through the crimes of robbery, theft, and murder, to the destruction of the existing system of social order, and of all the laws and institutions upon which that system is based.

The association, whose principles are thus outlined in its platform, was divided into groups, of which there were eighty

in the United States in March, 1885, located principally in the centers of industry. For some time prior to May 1, 1886, there was a number of these groups in Chicago. The following are spoken of by different witnesses: The North Side group, which met at No. 58 Clybourne Avenue in the North division of the city; the Northwest Side group, which met at Thalia Hall, No. 636 Milwaukee Avenue in the northwestern part of the city; the American group, which met generally at No. 54 West Lake Street in the West division of the city, but sometimes at Baum's Pavilion at the corner of Cottage Grove Avenue and Twenty-second Street in the South division of the city, and at No. 45 North Clark Street, No. 106 Randolph Street, and on the Lake Front; the group "Karl Marx," which met at No. 63 Emma Street in the West division; the group "Freiheit," which met on Sherman Street in the South division; the Southwest Side group, which met at No. 611 Throop Street in the southwestern part of the city; the group "Jefferson No. 1," which met at No. 600 Milwaukee Avenue.

The defendants Schwab, Neebe, and Lingg belonged to the North Side group, the defendants Engel and Fischer to the Northwest Side group, and the defendants Spies, Parsons, and Fielden to the American group. Spies had also belonged to the Northwest Side group.

The members of these groups were known by numbers, and not by names. The members of the North Side group began to be known by numbers in July, 1884. The number of the witness Seliger, who belonged to the North Side group, was 72. Certain members of these groups were armed with rifles and drilled regularly once a week at their respective places of meeting, taking their rifles home with them after drill. These armed members were known and designated as the "armed sections" of the groups. The North Side group met every Monday night at 58 Clybourne Avenue, and the armed section drilled there every Sunday morning. The armed section of the American group met every Monday evening at No. 54 West Lake Street. The Northwest Side group met Thursday evening at No. 636 Milwaukee Avenue. The Southwest Side group met every Saturday evening at No. 611 Throop Street.

There was also a certain armed socialistic organization, called the Lehr und Wehr Verein, whose members seem to have been members, also, of the International groups, but to have been of a higher rank and to have attained a higher

grade in the perfection of their drill than was the case with the ordinary members of the "armed sections." The evidence does not disclose the exact number of those who belonged to the Lehr und Wehr Verein at the time of the trial, but in 1879 it had one thousand men. Its members were armed with Springfield rifles, and were known by numbers. They conducted their drills and military exercises at Thalia Hall, No. 636 Milwaukee Avenue, where the Northwest Side group, the most radically anarchistic of all the groups, held its meetings.

The Lehr und Wehr Verein had four companies in Chicago. The witness August Krueger, whose number was 8, was orderly sergeant and corresponding secretary of the second company. Godfried Waller, whose number was 19, and Bernard Schrade, whose number was 32, were members of this second company. Schrade also belonged to the Northwest Side group, and says they drilled once a week, and kept their Springfield rifles at home. The third company seems to have had a drill every Thursday evening at a workingmen's hall on West Twelfth Street.

The "armed section" of the American group was called the International Rifles. After one of its drills, on August 24, 1885, at No. 54 West Lake Street, ten men, dressed in blue blouses, and each armed with a Springfield rifle, and who belonged to the first company of the Lehr und Wehr Verein, were introduced into the room and drilled for the benefit of the new members of the International Rifles. It was then and there stated, that, in case of a conflict with the authorities, the International Rifles were to act in concert with the Lehr und Wehr Verein, and obey the orders of its officers. From this it would appear that the Lehr und Wehr Verein, or its officers, were to direct the movements of the ordinary "armed sections," when occasion should require.

In the spring of 1885 there were in the city of Chicago three thousand of these armed socialists, of whom the defendant Parsons then said that "they were well armed with rifles and revolvers, and would have dynamite and bombs when they got ready to use them." As they were known by numbers, no record was kept of their names, and a system was adopted by which the members would be as little known to each other as possible.

These groups were represented by a general committee, composed of delegates from all the groups of the International

Association in Chicago. This committee met every two weeks in a building in the South division of the city, known as No. 107 Fifth Avenue, and called by the witnesses the Arbeiter Zeitung building, or the building of the International Arbeiter Association. The meetings of this committee were held in a library-room, which is spoken of by one of the witnesses as belonging to the Arbeiter Zeitung newspaper hereinafter mentioned, and which was located in the rear of the office-room of that paper. In August, 1885, at the time of what is called the "car-drivers' strike," the witness Seliger was present in this room as a delegate from the North Side group to the meeting of the general committee, and speaks of the defendant Spies as being there present on that occasion.

The members of the general committee had been in the habit of meeting in this library-room for a number of years, certainly since 1880. One Hirschberger was the librarian.

An exception should be made to the statement that all the groups appointed delegates to the general committee. The Northwest Side group did not do so; and the reason given for this by Fricke, who was at one time a member of that group, and for two years book-keeper of the Arbeiter Zeitung, was, that the principles of the Northwest Side group were more strongly anarchistic than those of the other groups. It was called an "autonomous" group.

A newspaper, called the Arbeiter Zeitung, and conducted in the interest of the German-speaking groups of the International Arbeiter Association, was published in the building No. 107 Fifth Avenue, and had its office and editorial-rooms there. Its superintendent and chief editor was the defendant Spies. The defendant Schwab was co-editor, and wrote some of the most important of the editorials. The defendant Fischer was a type-setter in the office, and about the 1st of May, 1886, was the head foreman of the printing-department. This paper was owned by a corporation, in which Spies, Schwab, Fischer, and Neebe were stockholders. It was printed in the German language, and besides its daily issue, had a Sunday edition, called the Fackel, and a weekly edition called the Vorbote. Its circulation was about three thousand six hundred. Notices of the meetings of workingmen were inserted in its columns without charge.

Another newspaper by the name of the Alarm, owned by the International Arbeiter Association, and conducted in the English language in the interest of the English-speaking

groups, was also published at the same building,—No. 107 Fifth Avenue. Its editor and manager from October, 1884, to May, 1886, was the defendant Parsons. The defendant Fielden owned some of the stock in the corporation which controlled it. Its circulation was about two thousand. It was first issued as a weekly, and afterwards as a semi-monthly, paper. Still another newspaper, called the Anarchist, was started in January or February, 1886, by the Northwest Side group, and two of the South Side groups. It was under the management of the defendant Engel. Its origin was announced as being due to the fact that the Arbeiter Zeitung was not outspoken enough in its anarchistic principles. Its efforts were directed to the same ends as those contemplated by the other papers mentioned.

All the bills for the printing of the Arbeiter Zeitung and the Alarm were made out to the Arbeiter Zeitung, and were paid by the defendant Spies, occasionally by check, but generally in currency.

There was a bureau of information of the Internationals. This also had its headquarters at the Arbeiter Zeitung building. The bureau of information, designated to act for the years 1885 and 1886, consisted of the defendants Spies and Parsons, the librarian Hirschberger, one Belthazer Rau, an advertising agent of the Arbeiter Zeitung, and one Joseph Bach, a member of the North Side group, and afterwards a director of the Arbeiter Zeitung. Letters were always addressed to Spies, as a member of this bureau, at 107 Fifth Avenue.

Besides the regular weekly meetings of the groups heretofore mentioned in their respective halls, there was occasionally a meeting of all the "armed sections" of the different groups at No. 54 West Lake Street, known as Greif's Hall.

These meetings of the "armed sections," whose members were located in the North, South, and West divisions of the city, were irregular. They were called by a signal given by the Arbeiter Zeitung. This signal was: "Y.—Komme Montag Abend," or "Y.—Come Monday night." Whenever these words appeared in the letter-box column of the Arbeiter Zeitung, they were understood to be a summons to the "armed sections" to meet on Monday night, at Greif's Hall.

The evidence in the record shows that there were in the city of Chicago twenty-five or thirty labor unions, containing from fifteen thousand to sixteen thousand laborers, and that delegates from these unions constituted a body called the Central

Labor Union. The large majority of those who belonged to the labor unions were well-meaning workingmen, whose designs were not unlawful, and the object of whose organization was to better their own condition. They did not all belong to the groups of the International Association. But the members of those groups were, as a general thing, also members of the different labor unions.

It thus appears that the branch of the International Workingmen's Association which existed in Chicago during the year 1885, and up to May 4, 1886, was a compact, well-disciplined organization. At the head of it was a general or central committee. Next to the committee came the Lehr und Wehr Verein, a secret military organization divided into companies. Next to the Lehr und Wehr Verein came the "armed sections" of the various groups, practicing their weekly drills at night and on Sunday in various parts of the city, and, in some instances, under the direction of the officers of the Lehr und Wehr Verein. Next came the unarmed members of the groups, who were constantly in contact with their armed brethren, and in hearty sympathy with their purposes and principles. As to some of the groups, however, all the members seem to have been engaged in arming and drilling.

There can be no doubt that the organization here described was an unlawful conspiracy.

1. Its purpose was unlawful. It designed to bring about a social revolution. Social revolution meant the destruction of the right to private ownership of property, or of the right of the individual to own property; it meant the bringing about of a state of society in which all property should be held in common. As a court, we are not concerned with the question whether it was right or wrong to adopt and advocate an abstract theory in regard to the ownership of property such as is here indicated. But this abstract theory assumed a concrete and practical form. The police and militia were looked upon as protectors and guardians of the form of ownership in property which was objected to. Hence "social revolution" meant war upon the police and militia. The destruction by force of the police and militia in the city of Chicago was the practical object which this organization proposed to accomplish in that city.

2. Its methods were unlawful. The arming and drilling of the groups was in violation of the militia law of the state of Illinois, which provides that "it shall not be lawful for any

body of men whatever, other than the regular organized volunteer militia of this state, and the troops of the United States, to associate themselves together as a military company or organization, to drill or parade with arms in any city or town of this state without the license of the governor thereof," etc. It is not pretended that any such license was ever issued to these groups by the governor of the state.

The central or governing authority of this International organization had its headquarters in the Arbeiter Zeitung building, and in a room connected with the office of the Arbeiter Zeitung newspaper. From that place mainly its policy was dictated, and the orders which controlled its movements were issued. Among the principal persons who shaped its policy and outlined its course of action were the defendants Spies, Schwab, Engel, Lingg, Fielden, Parsons, Fischer, and, in a subordinate degree, Neebe.

These defendants sought to use the organization for the purpose of bringing about the "social revolution," and, to that end, endeavored to increase its membership and perfect its discipline so as to hurl it against the police and militia as the representatives of law and order. Among the means employed to accomplish this were "agitation, with a view to organization," and "organizations for the purpose of rebellion." The object of "agitation" was to increase the ranks of the "armed sections" of the international groups by recruits from the "labor unions," and other associations of workingmen. The meaning of "organization" was the arming of such recruits with dynamite and revolvers.

During the years 1885 and 1886, the defendants Spies, Schwab, Parsons, Engel, and Fielden, by numerous speeches, and by articles published in the newspaper organs above mentioned, persistently advised and encouraged the workingmen to arm themselves for a conflict with what were called the property-owning classes, and with the police and militia, who were regarded as the special protectors of those classes. These speeches were made at picnics, in workingmen's halls, at gatherings of the International groups, in Market Square, and from the windows of the Abeiter Zeitung building. They denounced the police and militia. They inveighed against the "private right of property." They advised the purchase of rifles and dynamite.

Extracts from the Alarm, the Arbeiter Zeitung, and the Anarchist, and from speeches of Schwab, Spies, Parsons,

Fielden, and Engel, are set out in the statement which precedes this opinion.

The articles in the Alarm were most of them written by the defendant Parsons, but some of them by the defendant Spies. The articles quoted from the Arbeiter Zeitung were written by the defendants Schwab and Spies. The single extract from the Anarchist was written by the defendant Engel.

The articles and speeches so collated are of the most violent and incendiary character. They seek to inspire a feeling of hatred among the workingmen against the police and militia and the property-owning classes. They not only recommend the workingmen to arm themselves with dynamite and rifles, but they give specific instructions how to handle and use dynamite, and how to make bombs, and how to procure weapons. They recommend the workingmen to attend the meetings of the International Arbeiter Association and read its organs. They advise the formation of special groups for committing deeds of violence, which are called "revolutionary actions," and point out the means of avoiding discovery after such deeds are committed. In the Arbeiter Zeitung articles will be found such expressions as these: "Each workingman ought to have been armed long ago"; "Daggers and revolvers are easily to be gotten, hand-grenades are cheaply to be produced; explosives, too, can be obtained"; "The workingmen ought to take aim at every member of the militia"; "Your passport to it — Eden — is that banner which calls to you in flaming letters the word 'anarchy'"; "Therefore, workingmen, do arm yourselves with the most effective means"; "There is no other way than to become immediately soldiers of the revolutionary army and establish conspiring groups, and let the ruins fall on the homes of such"; "We wonder whether the workingmen . . . . will at last supply themselves with weapons, dynamite, and prussic acid"; "Workingmen, arm yourselves"; "Enough is said about the importance of being armed. . . . . We are to go to work to supply ourselves as quickly as possible with these useful things. . . . . Dynamite bears several names here in America; among others it is known in trade also under the names of Hercules powder and giant powder"; "There marched a strong company of well-armed comrades of the various groups; . . . . the nitro-glycerine pills were not missing"; "There exists to-day an invisible network of fighting groups"; "Every trades-union should make it obligatory to every member to keep a good

gun at home and ammunition"; "If we do not bestir ourselves for a bloody revolution, we cannot leave anything to our children but poverty and slavery. Therefore prepare yourselves in all quietness for the revolution."

The following expressions will be found in the extracts from the Alarm:—

"One man, armed with a dynamite bomb, is equal to one regiment of militia," etc.; "Every man who is master of these explosives cannot be approached by an army of men"; "How can all this be done? Simply by making ourselves masters of the use of dynamite; then . . . . administer instant death, by any and all means, to any and every person who attempts to continue to claim personal ownership in anything. . . . . Our war is not against men, but against systems; yet we must prepare to kill men who will try to defeat our cause. . . . . The rich are only worse than the poor because they have more power to wield this infernal 'property-right'"; "Dynamite is the emancipator! In the hands of the enslaved it cries aloud, 'Justice or annihilation.' But, best of all, the workingmen are not only learning its use; they are going to use it. They will use it, and effectually, until personal ownership, property rights are destroyed, etc. . . . . Hail to the social revolution! Hail to the deliverer, Dynamite"; "Nothing but an uprising of the people and a bursting open of all stores and storehouses to the free access of the public, and a free application of dynamite to every one who opposes, will relieve the world of this infernal nightmare of property and wages"; "Seeing the amount of needless suffering all about us, we say a vigorous use of dynamite is both humane and economical. . . . . It is upon this theory that we advocate the use of dynamite. It is clearly more humane to blow ten men into eternity than to make ten men starve to death"; "Dynamite! of all the good stuff, this is the stuff. Stuff several pounds of this sublime stuff into an inch-pipe gas or water pipe, plug up both ends, insert a cap with a fuse attached, place this in the immediate neighborhood of a lot of rich loafers, who live by the sweat of other people's brows, and light the fuse. A most cheerful and gratifying result will follow"; "The next issue of the Alarm will begin the publication of a series of articles concerning revolutionary warfare, viz.: 'The Manufacture of Dynamite Made Easy,' 'Manufacturing Bombs,' 'How to Use Dynamite Properly,'" etc.; "All governments are domineering powers, etc. . . . . Assassination will remove the evil from

the face of the earth. . . . . Assassination properly applied is wise, just, humane, and brave. For freedom, all things are just"; "Though everybody nowadays speaks of dynamite, ... few have any knowledge of the general character and nature of this explosive. For those who will sooner or later be forced to employ its destructive qualities in defense of their rights as men, and from a sense of preservation, a few hints may not be out of place. Dynamite may be handled with perfect safety, if proper care is used," etc. (Then follow a series of minute directions.)

During the months of December, 1885, January, February, and March, 1886, the following notice appeared in the Arbeiter Zeitung:—

"'Exercise in Arms.' Workingmen who are willing to exercise in the handling of arms should call every Sunday forenoon, at half-past nine, at No. 58 Clybourne Avenue, where they will receive instructions gratuitously."

In the Alarm from August 17, 1885, to April 24, 1886, appeared the following notice:—

"The armed section of the American group meets Monday night, at No. 54 West Lake Street."

One Herr Most had prepared a treatise or book, entitled Revolutionary Warfare, containing instructions that entered into the minutest details as to the best mode of preparing dynamite and other explosives, and of making bombs and other weapons. From time to time, in 1885 and 1886, the Alarm and the Arbiter Zeitung published translations and extracts from this book, for the evident purpose of communicating the information in it to the members of the groups and to their other readers among the workingmen. Specimen extracts from this treatise are set out in the statement which prefaces this opinion.

In the extract from the Anarchist will be found the following expressions: "All government we hate. . . . . Complaints should be sent to G. Engel. . . . . Workingmen and fellows: . . . . he who would war successfully must equip himself with all implements adapted to destroy his opponents. . . . . We strive towards the overthrow of the existing order," etc.

The defendant Schwab, in a speech delivered on April 26, 1886, about a week before the Haymarket meeting, said: "Everywhere police and murderers are employed to grind down workingmen. For every workingman who has died

through the pistol of a deputy sheriff, let ten of those executioners fall. Arm yourselves!"

The defendant Spies, in a speech made in October, 1885, said that "there were nine millions of people engaged in industrial trades in this country; there were but one million of them as yet organized, while there were two millions of them unemployed; to make a movement in which they were engaged a successful one, it must be a revolutionary one; don't let us . . . . forget the most forcible argument of all, — the gun and dynamite."

In speeches made by him, the defendant Parsons said, in February, 1885: "We need no President, no congressmen, no police, no militia, and no judges; they are all leeches sucking the blood of the poor, who have to support them by their labor; I say to you, rise, one and all, and let us exterminate them all. Woe to the police or the militia whom they send against us!" In April, 1885, he said: "The only way to convince these capitalists and robbers is to use the gun and dynamite." Again, he said, in April, 1885: "If we would achieve our liberation from economic bondage, and acquire our natural right to life and liberty, every man must lay by a part of his wages, buy a Colt's navy revolver, a Winchester rifle, and learn how to make and to use dynamite. Then raise the flag of rebellion, the scarlet banner of liberty, fraternity, equality, and strike down to the earth every tyrant that lives upon this globe. Tyrants have no rights which we should respect. Until this is done, you will continue to be robbed, to be plundered, to be at the mercy of the privileged few; therefore agitate for the purpose of organization, organize for the purpose of rebellion; for wage-slaves have nothing to lose but their chains." And in August, 1885, referring to the street-car strike, he said: "If but one shot had been fired, and Bonfield had happened to be shot, the whole city would have been deluged in blood, and the social revolution would have been inaugurated."

The defendant Fielden, in speeches made by him, said, in March, 1885: "I want all to organize; every workingman in Chicago ought to belong to our organization; it is of no use to go and beg of our masters to give us more wages or better times. When I say 'organize,' I mean for you to use force; it is of no use for the working people to hope to gain anything by means of the ordinary weapons; every one of you must learn the use of dynamite, for that is the power with which

we hope to gain our rights." In October, 1885, he said: "You must all organize and use force; you must crush out the present government, as by force is the only way in which you better your present condition." He said, in January, 1886: "It is quite true that we have lots of explosives and dynamite in our possession, and we will not hesitate to use it when the proper time comes. We care nothing either for the military or police, for these are in the pay of the capitalist." Again, in March, 1886, he said: "We are told that we must attain our ends and aims by obeying law and order. Damn law and order! We have obeyed law and order long enough. The time has come for you, men, to strangle the law, or the law will strangle you."

The defendant Engel made a speech in German, in February, 1886, to a crowded hall of workingmen, of which one witness says: "He advised everybody,—'every man wants to join them, to save up three or four dollars to buy revolvers to shoot every policeman down'; he says he wants every workingman whom he could get to join them, and then advise everybody you know,—you save up three or four dollars to buy a revolver that was good enough for shooting policemen down"; and again, in the same month, he made a speech to the North Side workmen at Neff's Hall, 58 Clybourne Avenue, where the North Side group met, as already stated, in which he said "that those who could not arm themselves, and could not buy revolvers, should buy dynamite; that it was very cheap and easily handled; he gave a general description how bombs could be made, how gas-pipes could be filled; that a gas-pipe was to be taken, and a wooden block put into the end, and it was to be filled with dynamite; then the other end is also closed up with a wooden block, and old nails are tied around the pipe by means of wire; then a hole is bored into one end of it, and a fuse with a cap is put into that hole; that the nails should be tightened to the pipe, so that when it explodes there will be many pieces flying around; that gas-pipe could be found on the West Side from the river, near the bridge."

The utterances by printed and spoken words, of which the quotations above made are specimens, were addressed to workingmen, of whom the defendant Spies says that they were "stupid and ignorant." While the members of the International groups were reading and hearing the appeals thus made to their prejudices, they were discussing their condition

in weekly meetings, and very many of them participating in weekly drills with arms.

The time when the war against the police was to be inaugurated was not an indefinite period in the future. The evidence shows that the date fixed for the inauguration of the social revolution was the 1st of May, 1886.

Two years before May 1, 1886, the working people had "resolved that the eight-hour system should be introduced in the United States" at that date. The defendants in this case and the more radical members of the International groups had no faith in the eight-hour movement. This abundantly appears from the testimony in the record. Gruenhut swears that Spies did not consider the movement as amounting to anything; that he regarded it as "only a palliative measure, not radical enough." A want of confidence in it on the part of the defendant Spies is apparent from the language of some resolutions introduced by him on October 11, 1885, at a meeting at the Twelfth Street Turner Hall, one of which began in this wise:—

"*Resolved*, That while we are skeptical in regard to the benefits that will accrue to the wage-workers in the introduction of an eight-hour work-day," etc. At a speech made at the same meeting, Fielden said: "The eight-hour law will be of no benefit to the workingman." An article in the Alarm, dated April 3, 1886, in which the defendant Parsons gives an account of a speech made by him to the American groups, shows that he only valued "the attempt to inaugurate the eight-hour system" because he thought it "would break down the capitalistic system and bring about such disorder and hardship that the 'social revolution' would become a necessity."

Engel said in the Anarchist: "We reject reformatory measure as useless play. . . . . All endeavors of the working classes not aiming at the overthrow of existing conditions of ownership . . . . are to us reactionary," etc.

The 1st of May was fixed upon as the date for the inauguration of the "social revolution" because of the strikes and disturbances which were then expected to grow out of the demand for the eight-hour working-day. It was anticipated that many workingmen would then be out of employment, and that their discontent and sufferings would drive them into an adoption of the revolutionary plans of the International groups.

The witness Johnson says that at the meetings of the

"armed section" of the American group "the first day of May was frequently mentioned as a good opportunity" for the revolution.

In a speech in December, 1885, at Twelfth Street Turner Hall, Fielden said: —

"The 1st of May will be our time to strike the blow; there are so many strikes, and there will be fifty thousand men out of work."

Spies said that the conflict between the police and the "dynamiters" would probably occur, when there should be a universal strike for the eight-hour law.

The International groups and other associations of workingmen were frequently urged to prepare to demand the eight-hour law on the 1st of May, 1886, with arms in their hands. They were told that such demand would be the more readily acceded to if made by armed men.

In an article published in the Arbeiter Zeitung on the afternoon of Tuesday, May 4, 1886, only a few hours before the Haymarket meeting occurred, the defendant Spies said: "Six months ago, when the eight-hour movement began, there were speakers and journals of the I. A. A. who proclaimed and wrote: 'Workmen, if you want to see the eight-hour system introduced, arm yourselves! If you do not do this, you will be sent home with bloody heads, and birds will sing May songs on your graves.'"

Looking into some of the statements made by the journals and speakers referred to, we find the following: —

The Arbeiter Zeitung said, on January 22, 1886: "With empty hands, the workingmen will hardly be able to cope with the representatives of the club, in case, after the 1st of May of this year, there should be a general strike; . . . . but if the workingmen are prepared to eventually stop the working of the factories, to defend himself with the aid of dynamite and bombs against the militia, which will, of course, be employed, then, and only then, can you expect a thorough success of the eight-hour movement." It said, on January 23, 1886: "Therefore, comrades, armed to the teeth, we want to demand our rights on the 1st of May; in the other case, there are only blows of the club for you." It said, on March 2, 1886: "Who wants to attack capitalism in earnest must overthrow the body-guards of it, the well-drilled and well-armed 'men of order,' and kill them, if he does not want to be murdered himself. But for this is needed an armed and

systematically drilled organization"; and on the same page are these words: "The time up to the 1st of May is short. Look out!"

The Alarm said, on September 5, 1885: "Now, in regard to the proposed strike next spring, a few practical words to our comrades. . . . . Will the manufacturing kings grant the modest request? . . . . No, sir; . . . . they will then draw from the army of unemployed; the strikers will attempt to stop them. Then comes the police and the militia. . . . . Say, workingmen, are you prepared to meet the latter? are you armed?"

The defendant Spies, on October 11, 1885, at the meeting at Twelfth Street Turner Hall already referred to, introduced, in a speech made by him, the following resolution:—

"Whereas, a general move has been started among the organized wage-workers of this country for the establishment of an eight-hour work-day, to begin May 1, 1886; and

"Whereas, it is to be expected that the class of professional idlers, the governing class, who prey upon the bones and marrow of the useful members of society, will resist this attempt by calling to their assistance the Pinkertons, the police, and the state militia,—

"*Resolved*, That we urge upon all wage-workers the necessity of procuring arms before the inauguration of the proposed eight-hour strike, in order to be in a position of meeting our foe with his own argument,—force."

A little over two months after this resolution was introduced, to wit, on December 29, 1885, the North Side group, to which Schwab, Lingg, and Neebe belonged, held a meeting at No. 58 Clybourne Avenue, and adopted the following resolution: "This assembly declares that the North Side group, I. A. A., pledges itself to work with all means for the introduction of the eight-hour day, beginning on the 1st of May, 1886. At the same time the North Side group cautions the workingmen not to meet the enemy unarmed on the 1st of May," etc.

Besides the publication of extracts from Herr Most's book in the Alarm and Arbeiter Zeitung, the book itself was extensively circulated among the groups and other workingmen. The Arbeitur Zeitung inserted without charge, on March 2, 15, 18, and 25, 1886, the following notice: "'Revolutionary Warfare' has arrived, and is to be had through the librarian, at 107 Fifth Avenue, at the price of ten cents." Hirschberger,

the librarian here referred to, sold this book at picnics, where the defendants Fielden, Parsons, Spies, Schwab, Fischer, and Neebe were present. It was distributed at meetings of workingmen. It was seen at such meetings in the Twelfth Street Turner Hall, at Greif's Hall, and at 106 Randolph Street, at all of which places Fielden and Parsons made speeches, and where the American group to which they belonged held meetings. The "books were sold there. The chairman had charge of the books."

One of the witnesses says he saw copies of Herr Most's book at meetings of the North Side group, and that "the North Side group bought and sold them."

The efforts of the defendants to prepare for the disturbances expected to grow out of the eight-hour movement on or about May 1, 1886, were not confined to speeches or newspaper articles. Nor was the circulation of Herr Most's book on revolutionary warfare the only step taken towards the instruction of the groups in the mode of preparing and using dynamite. The record discloses the adoption by the defendants of other and more practical measures in the work of preparation.

In the fall of 1885, the defendant Engel called on a gunsmith and inquired what a hundred, or possibly two hundred, large revolvers could be purchased for, stating that they were wanted for some society. He bought and paid for one of the pistols, for the purpose of presenting it at a meeting of the society. After the Haymarket meeting, a machine, which was intended to be used for the purpose of making bombs, was found by the police at Engel's house. The proof shows that in the late spring or early summer of 1885 a part of this machine was made by a tinner on Milwaukee Avenue, in pursuance of an order there for given by Engel in person.

A witness engaged in the gun business swears that, in February or March, 1886, the defendant Parsons called at his store and stated that he wanted to buy forty or fifty revolvers. Upon being shown the samples on hand, he declared that they were not what he desired, but that he wanted "old remodeled Remington revolvers." The witness wrote for quotations as to the prices, and gave them to Parsons upon his calling afterwards. He came in again once or twice, but did not finally make the purchase.

The testimony shows that, in the summer of 1885, the defendants Fielden and Parsons participated in the drilling exercises at No. 54 West Lake Street of the "armed section" of

the American group, to which they both belonged, and of which Fielden was the secretary and treasurer. A drill occurred at that place on August 24, 1885. Fielden and Parsons were present and took part. Suspected persons were ejected, the doors were closed, and the company was drilled for half or three quarters of an hour by a German drill-master, going through the regular manual of drill, marching, countermarching, turning, forming fours, wheeling, etc. It was on that occasion that the ten members of the first company of the Lehr und Wehr Verein, armed with Springfield rifles, were introduced, and drilled before the members of the "armed section" of the American group. On that occasion, also, the "armed section" adopted the name of the "International Rifles," of which one Walters was elected captain, and the defendant Parsons lieutenant. The International Rifles there agreed, as heretofore stated, to act in concert with the Lehr und Wehr Verein, and obey the orders of its officers in the event of a conflict with the authorities. At that meeting the drill-master exhibited two specimens of the latest improved dynamite bombs, for the examination of those present. They were about the size and had the appearance of ordinary preserve fruit-cans. The top part unscrewed, and the inside of the cans was filled with a light-brown mixture. There was also a small glass tube inserted in the center of the can. The tube was in connection with the screw, and it was explained where the can was thrown against any hard substance it would explode.

At a subsequent meeting at the same place on August 31, 1885, the defendants Fielden and Parsons were present and participated in another drill under Walters, which lasted an hour and a half. A consultation was had as to the best means of procuring arms. It was proposed that each member should pay so much a week, until enough should be raised to buy a rifle for each. The defendant Parsons proposed that a raid be made at night upon the armory of the militia.

It furthermore appears, from the evidence, that the defendants Spies, Schwab, Fielden, Parsons, and Fischer were engaged in handling bombs and experimenting with dynamite. Samples of bombs were kept at the rooms of the Arbeiter Zeitung. Improved kinds of bombs were several times left there for the inspection of the defendant Spies. At one time two bombs, whose shells were of iron, and which were so made as to be exploded by percussion, were left with the defendant Spies at his office in the building No. 107 Fifth Avenue. At

another time two bombs, known as the czar bombs, were brought to Spies at the same office and left there with him.

The defendant Spies admits in his testimony that he purchased bars of dynamite and caps and fuse for the purpose of experimenting with them. On the morning after the Haymarket meeting there were found at the office aforesaid a coil of fuse, two bars of dynamite, and a box containing fulminating caps for the explosion of dynamite.

Three witnessess swear that they were at the office of the Arbeiter Zeitung in April, 1885, on the evening of what is known as the board of trade demonstration, and after the demonstration had ended; that Spies, Parsons, Fielden, and Schwab were present; that a dynamite cartridge, a coil of fuse, and a fulminating cap were taken by Spies from a drawer in the desk and handed to Parsons, by whom they were exhibited to the witnesses. On that occasion, Parsons said that they were preparing for a warfare against the police and militia with bombs and dynamite and rifles and revolvers; and Fielden, who was standing at the elbow of Parsons, said that "the next time the police attempted to interfere with them they would be prepared for them," "and perhaps in the course of a year or so."

In August, 1885, Seliger was present at the office of the Arbeiter Zeitung, at a meeting of the general or central committee of the International Association. He was there as a delegate from the North Side group. The committee met in the evening in the library-room belonging to the International Workingmen's Association. The defendant Spies was present. Seliger saw there two bombs, one round one and one long one. They were below the counter. Rau, the advertising agent of the Arbeiter Zeitung, was exhibiting them while the delegates were present.

On Thanksgiving day, in November, 1885, there was a meeting of workingmen on Market Square. On that day, at Thalia Hall, the defendant Fischer gave to Godfried Waller, a member of the Lehr und Wehr Verein, a gas-pipe bomb seven or eight inches long, saying that it was to be used on Market Square in case of an attack by the police. Waller kept the bomb in his house two weeks, and then gave it to a member of the Lehr und Wehr Verein, who exploded it in the woods, in a hollow tree.

Spies and other members of the organization to which he belonged were in the habit of going out into the country in

the summer and practicing with bombs. Their practice was directed to the twofold object of learning how to throw the bombs, and also of learning how to explode them. An instance is referred to in the evidence where one of them was exploded in a grove and demolished some of the trees.

One of the witnesses testifies that in January, 1886, at the Arbeiter Zeitung office, he had an interview with the defendant Spies, at which one of the czar bombs, heretofore referred to, was produced and shown by Spies, and afterwards carried away by the witness. On that occasion Spies stated that bombs were sometimes distributed through the Arbeiter Zeitung office, and that the one then shown was one of the samples they kept there. He also then stated that a fuse bomb with a detonating cap inside, such as was the czar bomb, had been proven to be the best kind, and that shells made of compound metal were much better than shells made of all lead or all metal. He spoke of a body of tall, strong men in their organization who could throw bombs weighing five pounds 150 paces.

He stated that the bombs in question were to be used in case of conflict with the police or militia.

Coming back to the defendant Lingg, we think it quite apparent from the testimony that his efforts in the matter of constructing bombs, as heretofore narrated, were made under the auspices of the International Association, and in furtherance of its objects and purposes. What he did was merely a part of that general preparation which the other defendants, and the groups already described, were making for the conflict expected to take place in the early part of May, 1886.

That this is so will appear from several considerations:—

1. In March, 1866, the carpenters' union had a ball at Florus Hall, No. 73 West Lake Street. A profit was made on the beer sold at this ball, and it was there suggested that the money representing that profit should be used to buy targets, lead, etc., for some shooting practices that were expected to take place. The money was, however, turned over to the "armed section" of the carpenters' union,—that is to say, to those members of the carpenters' union who belonged to the "armed sections" of the different International groups. Several of these members came together at a subsequent meeting, and resolved to buy dynamite, and practice with that instead of shooting at targets. The last-named meeting also took place at Florus Hall, and Lingg and Lehmann, who both be-

longed to the "armed section" of the North Side group, were present. Lehmann says: "It was unanimously resolved that we were to buy dynamite with it, and experiment with it to find out how it was used,—how it was handled. We were unanimous that some one should take the thing in hand, and Lingg was intrusted with it, and he took the money and bought dynamite with it."

It was just about this time, to wit, the middle of March, 1886, when Lingg first brought a bomb and dynamite to Seliger's house, and began to melt and cast, and make shells, as heretofore set forth.

It thus appears that, about two months or six weeks before the Haymarket meeting, the defendant Lingg was selected by certain members of the "armed sections" of the International groups as their agent to buy dynamite with their money and experiment with it, and learn how to use and handle it.

The reason why Lingg was selected for this work is quite manifest. Although he was only twenty-one or twenty-two years old at the time of the trial, and prior thereto had lived in this country only about nine or ten months, he seems to have taken an active interest in the movements of the International Association. He had been a socialist in Europe "ever since he could think." As already stated, he belonged to the "armed section" of the North Side group. He was not only a member of the carpenters' union, but its financial secretary. He was seen at meetings on the Lake Front, where some of the defendants already named were making speeches. He was present at meetings of the Central Labor Union. He made a speech on April 4, 1886, at 650 Blue Island Avenue, at the second meeting of the lumber-shovers' union. He was seen at almost every meeting of the carpenters' union at Zepf's Hall, from September, 1885, to May, 1886. At a meeting of that union at Zepf's Hall on the night of May 3, 1886, he is said to have made a lengthy report as to the organization of the carpenters at the different shops, and to have had the floor two or three times in the discussion of the eight-hour movement. On the morning of May 3d, young men came to his room at Seliger's house, and had their names entered upon the list of the union. He was well known to Bach and Spies; the former had known him five or six months. He carried reports of anarchist meetings to the Arbeiter Zeitung, and had gone to that paper for that purpose at least five times. He was present on the afternoon of May 3, 1886, at the attack hereafter mentioned of a mob of strikers upon a manufactur-

ing establishment in the southwestern part of the city, and must have heard the address of Spies on that occasion. He claimed, after his arrest, to have been clubbed by the police at that disturbance.

2. Thielen, Lehmann, Seliger, Hermann or Heumann, and Huebner, who were with Lingg on Tuesday afternoon while he was filling the bombs, and some of whom were assisting him in his work, were all prominent members of the "armed sections" of the International groups. Huebner was the librarian of the North Side group, and had charge of the distribution of Herr Most's book. Seliger, with whom Lingg had boarded for months, and who was his main assistant in making the bombs, was a member of the general committee, which stood at the head of all the groups, and, as has already been stated, had been present with Spies at a session of that committee when Rau was exhibiting to its members samples of round and long bombs, such as Lingg himself afterwards made.

3. One of the czar bombs, which was in the possession of Spies in January, 1886, was produced upon the trial of this cause in the court below. It is similar in all respects to the bombs made by Lingg, and to the bomb which exploded at the Haymarket. We find photographic views of it in the record. It consists of two semi-globular shells fastened together by a metallic bolt, with a head at one end and a nut at the other.

It has the fuse and detonating cap, the latter pinched to hold the fuse, just as appears in the photographic representations to be found in the record of the bombs made by Lingg.

The nut taken from the body of Hahn corresponded as exactly with the nut upon the czar bomb as with the nuts upon the Lingg bombs.

A chemical analysis was made of the material of the shell of the czar bomb, and such material was found to be the same composite manufacture as that which characterized the Lingg bombs and the Haymarket bomb. The "Spies bomb" or czar bomb "was found, like the others, to consist also chiefly of lead, with a small quantity of tin, and traces of the same antimony, iron, and zinc." This circumstance, taken in connection with the declaration of Spies that members of the International groups had, by practice and experiment, demonstrated the superiority of compound metal in the construction of bomb-shells, points very strongly to the conclusion that the czar bomb retained by Spies in his possession in January,

1886, was used by Lingg as a sample, and was the same bomb which Seliger saw at his house in Lingg's hands more than six weeks before May 4, 1886.

4. Another circumstance is worthy of mention in this connection. In a communication upon the subject of making bombs, published by Spies in the Alarm, on June 27, 1885, he says: "When filling bombs . . . . tie a handkerchief over mouth and nose, so that you may not inhale the dangerous gases. . . . . In filling bombs use a little wooden stick," etc.

It has already been stated that when Lingg and Huebner were filling bombs on the afternoon of Tuesday, May 4, 1886, each of them had a cloth tied around his face, and Seliger and Lingg used a flat piece of wood, made by Lingg for the purpose of putting dynamite into the shells. Thus the instructions given by Spies in the Alarm were literally complied with by the bomb-makers on May 4, 1886.

We think the jury were warranted in believing from the evidence that the bomb which exploded at the Haymarket was made by the defendant Lingg in furtherance of the conspiracy already described.

The question which next suggests itself is, whether the bomb so made was thrown at the Haymarket by a member of said conspiracy, or by some one acting under its direction and in pursuance of its designs.

In order to solve this question, it will be necessary to make a preliminary investigation as to the disposition which Lingg and his assistants made of the bombs constructed by them, after they were prepared for use.

The bombs made and filled on Tuesday afternoon and evening were carried by Lingg and Seliger on that evening from Seliger's house over to No. 58 Clybourne Avenue, known as Neff's Hall. The trunk or satchel in which they had been placed was carried a part of the way by Lingg and Seliger by means of a stick drawn through the handle. They were met on the way, however, by Muenzenberger, who has been heretofore spoken of, and he seems to have then taken the trunk and carried it the rest of the way on his shoulder. It was about ten minutes' walk from 442 Sedgwick Street to Neff's Hall. Neff says that they reached his saloon at ten or fifteen minutes after eight, but Seliger states that they started from his house with the bombs at half-past eight.

At No. 58 Clybourne Avenue the front room on the first floor is a saloon. Back of the saloon is a hall or assembly-room.

Between the saloon and hall is a passage-way, which can be entered by doors leading from the saloon and hall, and also by a door opening upon a walk that leads along the side of the building into the street. On this evening a meeting of painters was in session in the hall. Lingg, Seliger, and Muenzenberger first went into the saloon, and Lingg inquired of Neff if any one had been there and asked for him, to which he received a negative reply. Lingg and Seliger, accompanied by Muenzenberger, with the satchel or trunk, then went from the saloon into the passage-way above referred to. The trunk was placed upon the floor in this passage-way or hall-way, and opened. Seliger says: "Several persons came and took bombs. There were different ones there who took bombs out for themselves." He saw three or four take them. He himself took two and carried them in his pocket until after the explosion that night, when he buried them under the sidewalk on Sigel Street, where they were afterwards found, as shown by the testimony of several witnesses.

Lingg and Seliger then went out of the building, No. 58 Clybourne Avenue, leaving the open satchel with the bombs in it in the passage-way, where it had been deposited.

Muenzenberger also disappeared. The latter seemed to be a stranger; Neff, the keeper of the saloon, never saw him until he brought the satchel there that night; Lehmann did not know him, as has already been stated. Although he was at Seliger's house that afternoon from four to six o'clock working at bombs, Seliger did not know his name, and did not learn it until some time afterwards. This circumstance naturally calls to mind the instructions in regard to revolutionary actions published in the Arbeiter Zeitung on March 16, 1885, and set forth in the statement hereto prefixed, one sentence of which is as follows: "In the commission of a deed, a comrade who does not live at the place of action — that is, a comrade of some other place — ought, if possibility admits, to participate in the action; or, formulated differently, a revolutionary deed ought to be enacted where one is not known."

In this narration in regard to the disposition of the bombs, two facts are noticeable: 1. They were carried to and left at No. 58 Clybourne Avenue. Why? Neff's Hall was known as the "Shanty of the Communists." There the communists and anarchists and all the various shades of the socialistic organizations were in the habit of meeting. Some statements already made in regard to this place may be here briefly recapitulated. It was the place where the members of the North

Side group met every Monday evening and advised together and reviewed what had happened among the workingmen during the week, and drilled with hunting-guns and shotguns, and some of them, on Sundays, with rifles. It was the place where the Arbeiter Zeitung requested workingmen, willing to exercise in the handling of arms, to call every Sunday for the purpose of receiving instructions gratuitously. It was the place where the North Side group had adopted a resolution cautioning the workingmen "not to meet the enemy unarmed on May 1st," etc. The manner in which the bombs were left at this particular place and there exposed to view, considered in connection with all the other circumstances heretofore and hereafter mentioned, points strongly to the conclusion that they were intended for the use, on that evening, of the members of the conspiracy, whose principles and purposes have already been outlined.

2. The fact that as soon as the trunk was opened and deposited in the hall-way men came forward and took bombs therefrom, indicates an expectation that bombs would be found at that place at that time. The prompt appearance of these men at No. 58 Clybourne Avenue as soon as Lingg arrived there, and their immediate appropriation of the bombs placed before them, are circumstances which tend to establish the existence of some more specific plan for the use of the bombs than that which has heretofore been pointed out. To ascertain what this specific plan was, will require an examination of the events immediately preceding the explosion of the bomb at the Haymarket.

Up to the last days of April, 1886, the conspiracy in which the defendants were engaged was general in its character. Its object was the destruction of the police and militia of Chicago. The forces to be used in the accomplishment of this object were the International groups and such of the workingmen as could be induced to join those groups. The time when the conflict between the workingmen and the police was to be precipitated was about the 1st of May, and in the midst of the excitement which should prevail during the efforts of the laborers to shorten their hours of work.

The preparations for the expected conflict became more definite as the eight-hour movement approached its culmination. Inside of the general conspiracy already described, and growing naturally out of it, a more detailed plan for securing the ends sought to be attained was originated, adopted, and partially executed.

Early in the evening of May 3, 1886, the commander of the Lehr und Wehr Verein rented the basement of the building known as No. 54 West Lake Street, and also called Greif's Hall, for the purpose of holding there on that evening a meeting of the "armed sections" of the International groups.

The meeting was held in pursuance of the arrangement so made. It was secret. A guard was placed in front of the building, and another was also stationed in the rear, to prevent any entrance into the basement by outsiders.

Some seventy or eighty members of the "armed sections" from the North, South, and West divisions of the city were present. The session lasted from eight o'clock to eleven o'clock. The members present at this gathering discussed and adopted the plan hereinafter set forth.

On the day before, that is to say, on the morning of Sunday, May 2, 1886, at ten o'clock, the members of the second company of the Lehr und Wehr Verein and of the Northwest Side group had met at Bohemian Hall, on Emma Street, in the northwestern part of the city. On that occasion the defendants Engel and Fischer were both present. Engel had there submitted to this Emma Street meeting "a plan of his own conception, according to which, whenever it would come to a conflict between the police and the Northwestern groups, that bombs should be thrown into the police-stations, and the riflemen of the Lehr und Wehr Verein should post themselves in line at a certain distance, and whoever would come out should be shot down,—all those that would come out of the station or stations, he said; then it should proceed in that way until we would come to the heart of the city. Within the heart of the city, of course, the fight should commence in earnest." It was also arranged that the members of the Northwest Side groups should "mutually assist themselves to make an attack upon the police," and "if any one had anything with him he should use it."

This plan of Engel had been submitted by him to the Emma Street gathering in the form of a resolution, and had been adopted.

On the next evening, that is to say, on the evening of Monday, May 3, 1886, Engel and Fischer were also present at the meeting in the basement of Greif's Hall, and actively participated in the proceedings there taken. Among those assembled at this meeting there had been distributed a certain circular, written that afternoon by the defendant Spies, known as the Revenge Circular. This circular will be hereafter more

particularly referred to. It alleged that six workingmen had been killed by the police on that very afternoon at a disturbance in the southwestern part of the city, and called upon the workingmen to arm themselves and "avenge the atrocious murder which has been committed upon your brothers to-day, and which will likely be committed upon you to-morrow."

The contents of the circular were discussed, and suggestions were made as to what should be done within the next few days. The defendant Engel then presented to the representatives of all the groups the plan which had been accepted at his suggestion, on the day before by the Northwest Side group alone. There was some opposition to it. One member "thought that there was too few of us, and it would be better if we would place ourselves among the people and fight right in the midst of them. There was some opposition to that,—to be in the midst of the crowd,—as we could not know who would be our nearest neighbor of the crowd; there might be a detective right near us, or some one else." The plan of Engel was, however, finally adopted. The several features of the plan adopted on Monday evening deserve special consideration, in view of the occurrences at the Haymarket on the succeeding evening.

1. As to the attacks upon the police and the police-stations: It was Engel's suggestion that the members of the armed sections should come to the assistance of the workingmen, whenever a collision between them and the police should grow out of the eight-hour strike then in progress; that a bomb should be thrown into each police-station in the city, beginning with that on North Avenue in the North division, and the policemen, as they rushed out of the station on account of the explosion of the bomb so thrown, should be shot down by the riflemen of the Lehr und Wehr Verein, stationed in line for that purpose; that the police would thus be prevented from coming from their respective stations to the scene of conflict when they should be summoned by the authorities to do so; that the different International bodies, after storming the stations and shooting down the police, should march inward towards the center of the city, destroying whatever should oppose them; that the telegraph wires and the hose of the firemen should be cut; that the ranks of the Internationals would gain large accessions from the workingmen as soon as these attacks upon the police should be begun.

2. As to the signal for the inauguration of the attacks upon the police: The defendant Fischer suggested the German

word "Ruhe," the signification of which in English is "rest," or "peace," as a signal word to be adopted by the meeting. His proposition was agreed to. By the terms of it, whenever the word "Ruhe" should appear in the letter-box column of the Arbeiter Zeitung it was to be understood that the "social revolution" had begun; the publication of that word in the paper named was to be a signal to the members of the "armed sections" of the various groups that they were to arm themselves and repair to certain specified meeting-places, and when they should there be informed by report from a committee hereinafter named that a collision or conflict had taken place between the police and the workingmen, they were then to proceed to attack the stations and the policemen therein with bombs and rifles, as already stated.

3. As to the Haymarket meeting: The third feature of the meeting of the armed sections on Monday night was the arrangement made for a mass meeting on Tuesday evening at the Haymarket Square. The chairman who presided on Monday night suggested the holding of the mass meeting on the next morning, that is to say, Tuesday morning, at ten o'clock, in the Market Square in the South division of the city. The defendant Fischer, however, objected to both the time and place designated by the chairman. He advocated the holding of the mass meeting on Tuesday evening rather than Tuesday morning, and at the Haymarket Square instead of the Market Square. His proposition was adopted by the members of the armed sections, and it was then and there agreed that the Tuesday evening meeting should be announced through a handbill. The defendant Fischer was commissioned to have this handbill printed, and for that purpose left the Monday night meeting while it was in session. He returned in about half an hour, and reported that the printing-office was closed. He, however, had the handbill printed the next day, as will be seen hereafter.

Leaving for the present the discussion of the provisions made on Monday night for the gathering at the Haymarket, it will be necessary to notice,—

4. The appointment by the armed sections of a committee. As a part of the plan adopted on Monday night, a committee, consisting of one or two from each group, was appointed, the business of which was to be present at the Haymarket and "to observe the movement, not only on the Haymarket Square, but in the different parts of the city, and if a conflict should happen," to report to the members of the armed sections at

their various meeting-places, as above indicated. This committee was also intrusted with the task of publishing the word "Ruhe" in the Arbeiter Zeitung, when, in their judgment, the occasion for doing so should arise. As we understand the evidence, this same committee was to have the general control of the Haymarket meeting.

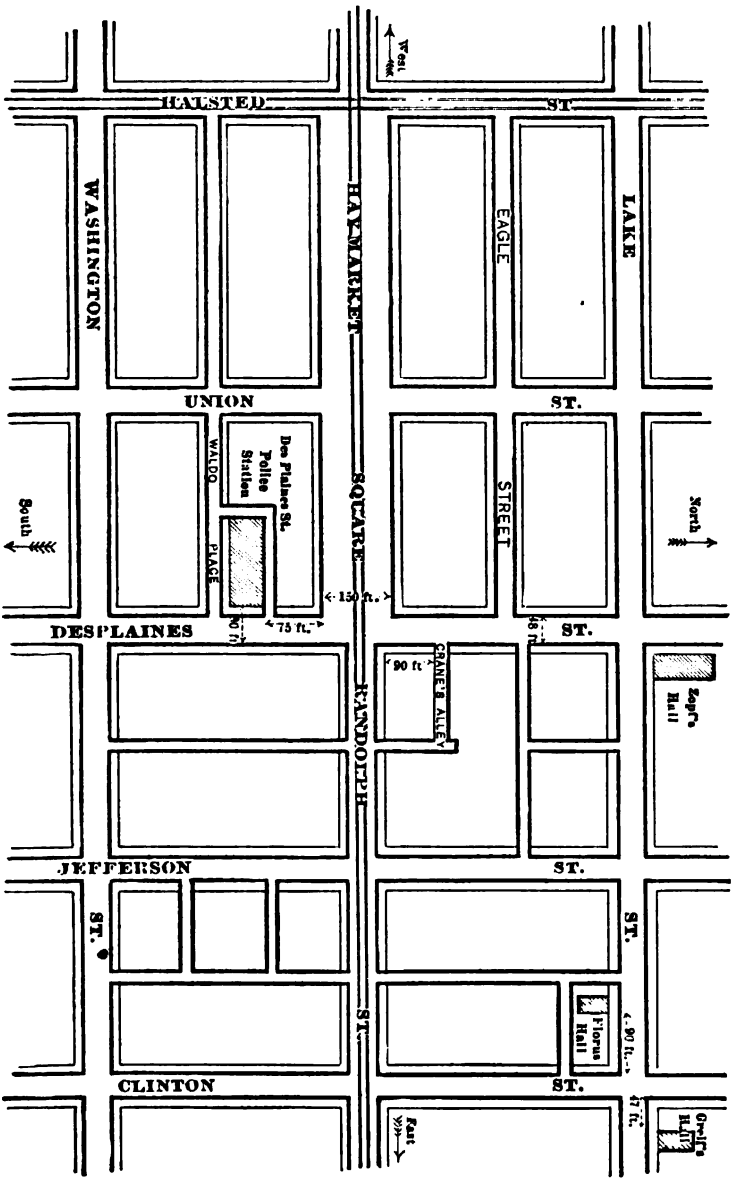
5. A resolution was passed that the details of the plan adopted by those present on Monday night should be communicated to absent members who could be relied upon.

Rudolph Schnaubelt, whom a part of the evidence tends to identify as the thrower of the bomb on Tuesday night, suggested that the plan adopted should also be communicated to comrades living in other cities, so that the revolution should commence in other places as well as in Chicago. This suggestion, however, does not seem to have been acted upon by the Monday night meeting.

Returning now to a consideration of the appointment of the Haymarket meeting, considered as a part of the Monday night plan, we think the jury were warranted in believing, from the evidence, that that meeting was not intended by those who made the arrangements for holding it to be a peaceable assemblage.

1. The resolution which provided for calling it was adopted by a secret gathering of the armed sections of the International groups. The record reveals many circumstances tending to show that a conflict was to be precipitated between the police and the twenty-five thousand workingmen who were expected to be present at the Haymarket. As one of the witnesses expresses it, it was to be held "to cheer up the workingmen so that they would be prepared if a conflict should happen."

2. The defendant Fischer, in the discussion on Monday night, assigned as a reason why the proposed mass meeting should not be held at Market Square, that the latter place was a "mouse-trap." This remark, under all the circumstances of the case, could have had no other meaning than that the conflict which was expected to occur might be too easily quelled by the authorities if it took place at Market Square. If the assemblage was to be entirely peaceable and lawful in its character, it could make no difference whether the place of its meeting was a "mouse-trap" or not. That the spot selected was not a mouse-trap will appear from an examination of the locality and its surroundings, as they are shown upon the following plat or diagram:—


West
HALSTED
ST.
WASHINGTON
HAYMARKET
SQUARE
EAGLE
LAKE
UNION
ST.
WALDO
PLACE
Des Plaines St. Police Station
South
North
STREET
150 ft.
75 ft.
DESPLAINES
ST.
90 ft
CRANE'S ALLEY
Zepf's Hall
RANDOLPH
JEFFERSON
ST.
ST.
ST.
ST.
Florus Hall
90 ft.
CLINTON
ST.
East
Orrin's Hall

The Haymarket is a widening of Randolph Street, which runs east and west. It begins on the east at Desplaines Street and terminates on the west at Halsted Street, the latter streets running north and south and crossing Randolph Street at right angles.

The speakers were not on the Haymarket itself, but on Desplaines Street, at a point a little more than a hundred feet north of the eastern end of the Haymarket. They made their speeches from a truck wagon, which stood on the east side of Desplaines Street, next to the sidewalk, and at a point about five or six feet north of the western end of Crane's Alley, the pole end of the wagon looking to the north and the rear end to the south. Crane's Alley begins on Desplaines Street at a point ninety feet north of Randolph Street, and runs east a short distance and then turns south into Randolph Street. Lake Street is the next street north of and parallel with Randolph Street; and between it and Crane's Alley is still another alley, running east from Desplaines Street to Jefferson Street, and tapped at a point half-way between the latter streets by an opening extending north to Lake Street. Between the Haymarket on the south and Lake Street on the north, a small street, called Eagle Street, runs westward from Desplaines Street to Halsted Street, crossing Union Street, which runs north and south between the two streets last named.

Between Crane's Alley and the alley north of and parallel with it is the manufacturing establishment of Crane Brothers, a large building, closed and unlighted at night, and in the shadow of which stood the wagon of the speakers. Some boxes had been placed on the edge of the east sidewalk of Desplaines Street a few feet south of the alley, furnishing a protection from the observation of those in the middle of the street.

On Lake Street, just north of the wagon, were many gathering-places of the workingmen, such as Greif's Hall, Zepf's Hall, and Florus Hall. There were also several such places to the south, on Randolph Street. On Tuesday night the halls and saloons in the neighborhood were crowded with workmen who were out of employment by reason of the strikes and other disturbances incident to the eight-hour movement, and whose feelings at this time were hostile to the police by reason of the efforts made by the latter to stop the attacks of strikers upon non-union laborers.

It will thus be seen that all the surroundings of the wagon,

in the way of streets, alleys, halls, buildings, sympathetic crowds, etc., furnished easy means of approach, escape, and concealment. As a mere strategical point, no better position could have been selected for the occurrences which actually took place on Tuesday night than the spot where the speakers' wagon was located.

3. The language of the handbill, calling the Haymarket meeting, which was issued in pursuance of instructions from the armed sections assembled in Greif's building on Monday night, shows that the meeting was not intended to be altogether peaceable. On Tuesday morning, at a quarter-past seven o'clock, Fischer went to a printing-office at the corner of Randolph and Market streets, and procured the handbill in question to be printed. It is as follows:—

ATTENTION, WORKINGMEN!

GREAT

MASS MEETING

TO-NIGHT, AT 7:30 O'CLOCK.

AT THE

HAYMARKET, RANDOLPH ST., BET. DESPLAINES AND HALSTED,

Good speakers will be present to denounce the latest atrocious act of the police,—the shooting of our fellow-workmen yesterday afternoon.

Workingmen, Arm Yourselves, and Appear in Full Force!

THE EXECUTIVE COMMITTEE.

The testimony is abundant that many copies of this handbill, containing the words: "Workingmen, arm yourselves, and appear in full force," were printed in German and English, and distributed among the workingmen throughout the city on Tuesday, May 4, 1886. Why urge men to come armed to an assemblage, if the assemblage is to be peaceful, especially when such arming is in violation of the law of the state?

It is true that at a later hour in the day, on Tuesday, a number of handbills were distributed, which were exactly the same as the above, with the exception that the words "Arm yourselves, and appear in full force," were omitted. But the evidence shows that the objectionable words were only left out of the second set of handbills through fear that they might deter some of the workmen from attending the meeting.

All the handbills, however, both those with and those without the objectionable words, declared the object of the meeting to be, not to discuss the eight-hour movement, but to "denounce the latest atrocious act of the police,—the shooting of our fellow-workmen yesterday afternoon." What was the

act of the police on Monday afternoon for which they were to be denounced?

A manufacturing company in the southwestern part of the city had employed certain laborers belonging to organizations styled "unions," and hence called "union laborers." These "union" workmen had inaugurated a strike, and quit work. The company employed in their places other workmen, not connected with the "unions," and called "non-union" workmen. The "striking union" laborers and certain "lumber-shovers" had made a most violent attack, not only upon the "non-union" laborers, but upon the buildings and property of the company. The police had been summoned to quell the riot, and as the result of their efforts to do so, one person, and not six, had died from the effect of wounds received on that occasion.

The city authorities did their duty when they ordered the police to stop this unjustifiable attack of the union workmen, re-enforced by striking lumber-shovers, upon men who were pursuing their lawful business. It follows that the Haymarket meeting was called for the purpose of denouncing the officers of the law because they had done their duty.

4. The testimony of Waller and Seliger shows that some trouble, not clearly defined in the language of unlearned witnesses speaking through an interpreter, was expected to take place at the Haymarket meeting. The discussions at the Monday night meeting indicated such an expectation. What other construction can be placed upon such language as this used at that meeting: "It would be better if we would place ourselves among the people, and fight right in the midst of them; we could not know who would be our nearest neighbor of the crowd; there might be a detective right near us," etc.?

One of the witnesses says that "it was planned to attack the police-stations to prevent the police from coming to aid, if there should be a fight in the city," and that those present Monday night expected there would be a fight. That this fight was expected to take place at or near the Haymarket would appear from the fact that, as soon as the stations were blown up, the armed men, and the workmen joining them, should march "to the heart of the city," where the fight would commence in earnest. The Haymarket was in the heart of the city. Lingg stated to Seliger on Tuesday night "that there should be made a disturbance everywhere on the North

Side to prevent the police from going over on the West Side." If the place to which the police were to be kept from going by the attacks upon the stations was in the heart of the city and on the West Side, it could not have been very far from the Haymarket Square.

5. The same committee which had charge of the Haymarket meeting, and had the power to call together the armed men at their meeting-places by the insertion of the word "Ruhe" in the Arbeiter Zeitung, was also instructed to attend at the Haymarket, and from there carry reports to them at their meeting-places. The thing they were to report to the armed men was a conflict with the police. As they were to attend at the Haymarket and report from there, a conflict must have been expected there.

That the plan adopted on Monday night, with its provisions for bomb-throwing, shooting, meeting-places, signal committee, mass meeting, communication with absent members, etc., was an unlawful conspiracy, there can be no doubt.

The question now arises whether the murder of Degan was committed in pursuance of this conspiracy, and as one of the objects to be attained by it, and whether the murder occurred while the parties to the conspiracy were engaged in such prosecution of it that Degan's death is to be considered the natural and necessary outcome and consequence of that prosecution. In other words, were the occurrences of Tuesday night the result of the conspiracy of Monday night? Was that which was done on Tuesday night done for the purpose of carrying out the plan of Monday night?

1. The main feature of the Monday night plan was the provision for throwing a bomb into each police-station, and then shooting down the policemen as they should come out. This provision had two parts: First, a bomb was to be thrown, creating destruction and confusion; second, in the midst of the confusion following upon the explosion of the bomb, the members of the armed sections and the riflemen of the Lehr und Wehr Verein were to fire into the policemen, and destroy them before they could recover from their surprise. Did this feature correspond with either or any of the events of Tuesday night? In order to determine whether it did or not, it is necessary to notice some of the occurrences which took place at the Haymarket meeting.

The crowd in attendance there was in the middle of Desplaines Street, and on the Desplaines Street sidewalks to the

south of the wagon, and extended around into the Haymarket to the west, and up into Lake Street to the north. Those appearing to be most in sympathy with the speakers were near the mouth of Crane's Alley, and on and around the wagon.

The station where the policemen had been holding themselves in readiness during the evening was located on the west side of Desplaines Street, seventy-five feet south of the Haymarket, and some three hundred feet or more south of the wagon, and between Randolph Street on the north and Washington Street on the south, the latter being the next street south of and parallel with Randolph Street. Some electric lights in front of a theater on Desplaines Street, south of the station, and in the neighborhood of Washington Street, served to light up at least that portion of Desplaines Street south of the Haymarket.

The police formed in line on Waldo Place, a small street running west from Desplaines Street, and on the south side of the station-house. They marched in regular order,—with their hands down, clubs in their belts, and pistols in their pockets,—northward, upon Desplaines Street, across the eastern end of the Haymarket, until they came "about to the mouth of Crane Brothers' alley." Here they halted, their front line being only a few feet south of the south end of the wagon. One of the officers in command then gave an order to disperse, as has already been stated.

The language in which the order was uttered is as follows: "I command you, in the name of the people of the state of Illinois, to immediately and peaceably disperse." These words are the same as those used in section 253 of division 1 of the Criminal Code of this state, which provides that "when twelve or more persons, any of them armed with clubs or dangerous weapons, or thirty or more, armed or unarmed, are unlawfully, riotously, or tumultuously assembled in any city, ... it shall be the duty of each of the municipal officers . . . . to go among the persons so assembled, ... and in the name of the state command them immediately to disperse."

If the police-officers had improperly intruded upon the meeting in question, such intrusion would have furnished no justification for the attack hereinafter mentioned. Persons injuriously affected by such improper intrusion or illegal dispersion had their remedies at law for damages sustained; or they could have demanded an investigation before the proper authorities, and upon proving their charges, could have ob-

tained the dismissal of officers guilty of infringement upon the rights of citizens.

We cannot say, however, that, in view of all the facts and circumstances surrounding the occasion, the police-officers were justly chargeable with exceeding their authority in the premises. Much disturbance and disorder existed in the city. Many strikes had recently occurred among the laboring men, many of whom were out of employment, and smarting under feelings of discontent. It had been reported to the authorities that the riot already referred to of the preceding afternoon in the southwestern part of the city had been mainly incited by a speech delivered to some "lumber-shovers" on the Black Road by the defendant Spies, who was observed to be the most active spirit at the Haymarket meeting. Copies of the Revenge Circular, and of the handbill prepared by the defendant Fischer, had fallen into the hands of the police. A rumor had also come to their headquarters that it was the intention of the parties at the Haymarket meeting to proceed to some neighboring railroad freight-houses where non-union laborers were employed, and blow them up. In addition to all this, it was reported to the officer in command of the force at the Desplaines Street station, that the defendant Fielden, who was then speaking, had just used the following language: "You have nothing more to do with the law except to lay hands on it and throttle it until it makes its last kick. . . . . Keep your eye upon it, throttle it, kill it, stab it, do everything you can to wound it"; and that the use of these words had produced great excitement, and caused noisy demonstrations around the wagon. Upon the reception of this report, the officer in command decided upon the dispersion of the meeting, and his men made the movement for that purpose, as already stated.

As soon as the order to disperse was given, the defendant Fielden descended from the wagon, making use of the words, "We are peaceable." Whether or not these words were uttered as the English equivalent of the German signal word "Ruhe," which meant "peace," the evidence does not conclusively show.

Certain it is that no sooner had Fielden said "we are peaceable" than the bomb exploded, and in a few seconds thereafter a volley of shots was fired.

Whether the crowd, which, upon the advance of the police in the middle of the street, had scattered to the north of the

wagon and to the sidewalks upon the east and west sides of Desplaines Street, fired into the police or not is one of the disputed questions in the case. According to the testimony for the state, persons in the street and upon the sidewalks discharged their revolvers into the midst of the police, some of the witnesses estimating the number of shots at seventy-five or one hundred. On the other hand, witnesses for the defense swear that the only shooting which was done came from the ranks of the police themselves. That the latter fired into the crowd after the explosion, is an admitted fact; but the prosecution claims that they did not do so until after they were fired into.

We think the weight of evidence is in favor of the position of the state upon this subject. If it be conceded that the witnesses for the prosecution, who are for the most part policemen, are interested on one side of the question, and that the witnesses for the defense, who are for the most part partisans of or sympathizers with the prisoners, are interested on the other side of the question, there is yet other evidence which seems to us to be decisive of the matter.

The testimony of the surgeons, who are entirely disinterested, shows that two police-officers died from the effects of bullet-wounds, and that many more, who did not die, received bullet-wounds. As the policemen were a solid body of well-drilled men, standing together in the street in well-formed lines and orderly ranks, it is impossible that they should have shot into their own midst. This being so, the bullet-wounds received by them must have been caused by shots from the crowd in their front and on their sides.

In addition to this, it has already appeared that many of the persons around the wagon had been preparing for a long time for the events expected to grow out of the eight-hour movement on May 1, 1886, by exercises in drilling, by the purchase of arms, by experiments with dynamite, and had been repeatedly urged in speeches, in newspaper articles, and by the circulars already mentioned, to meet those events in a state of armed preparation.

Morever, several of the newspaper reporters who were present confirm the statements of the policemen that shots were fired from the sidewalks into the police. One of the reporters saw several men around the wagon boldly exhibiting their revolvers while the speaking was going on. A revolver was

found on the sidewalk near the wagon, several barrels of which had been discharged.

It is apparent from this review of the evidence that just such an attack was made at the Haymarket as was contemplated and arranged for by the conspiracy of Monday night. First, a bomb was thrown among the policemen; next, shots were fired into their ranks by armed men, belonging to the organization heretofore described, and who had been gathered around the wagon during the evening. In the order of time, the shooting occurred a few seconds after the bomb exploded. This was the order in which the onset with the two different kinds of weapons was to be made, according to the terms of the conspiracy. The mode of attack as made corresponded with the mode of attack as planned.

It is true that the plan adopted contemplated the throwing of a bomb into each station, and then shooting down the police as they should come out. This was to be done, however, not only at the North Avenue station, but at the stations "in other parts of the city." The Desplaines Street station was a station in one of the "other parts of the city," and was as much embraced within the scope of the plan as the rest of the stations. It was in sight of the speakers' wagon, and only a short distance south of it. If a bomb had been thrown into the station itself, and the policemen had been shot down while coming out, a part of the conspiracy would have been literally executed just as it was agreed upon. It could make no difference in the guilt of those who were parties to the conspiracy that the man who threw the bomb, and his confederates who fired the shots, waited, before doing their work, until the policemen in the station had left it and had advanced some three hundred feet north of it.

If A hire B to shoot C at the Sherman House in the city of Chicago on a certain night, but B, seeing C enter the Tremont House on the same night, shoots him there, A is none the less guilty of aiding, abetting, advising, and encouraging the murder of C. If there is a conspiracy to kill policemen at a station-house, but the agents of the conspiracy kill the policemen a short distance away from the station-house, there is no such departure from the original design as to relieve the conspirators of responsibility.

A plan for the perpetration of a crime or for the accomplishment of any action, whether worthy or unworthy, cannot

always be executed in exact accordance with the original conception. It must suffer some change or modification in order to meet emergencies and unforeseen contingencies.

The International groups, as will be seen hereafter, had received information that the police intended to hold themselves in readiness for the expected outbreak at their respective stations. The presence of one hundred and eighty policemen at the Desplaines Street station, only seventy-five feet south of the Haymarket, seemed to contradict the correctness of this information, and to indicate a concentration instead of a scattering of forces on the part of the authorities. Such action by the authorities may have operated to change the original conspiracy for separate attacks upon the stations, and may have led to the concentration of a larger number of armed men at the Haymarket than was at first intended.

This appears from the language of Spies in his speech from the wagon, when he said: "It seems to have been the opinion of the authorities that this meeting has been called for the purpose of raising a little row and disturbance," etc., and when he asked "what meant this array of Gatling guns, infantry ready to arm, patrol wagons, and policemen?" It appears from the excited demeanor of Schwab, who says that he went from the Arbeiter Zeitung office to the Haymarket, passing through the tunnel and walking on Washington Street, and that he turned from Washington Street north on Desplaines Street. This course would take him by the Desplaines Street station, where he must have seen the policemen forming on Waldo Place. Just after this, he is described by two witnesses as rushing along hurriedly and almost running into the mayor; and by one witness as engaged in a conversation a few moments later with Spies, in which the word "police" was used. Fischer and Waller, also, noticed the mounting of patrol wagons on Waldo Place, and indulged in some conjectures as to what it meant. Some change of programme would also seeem to be indicated by the delay in opening the meeting. It was not called to order until half-past eight or nine o'clock, although the hour stated in the handbills was half-past seven. It was not actually opened until Lingg had deposited the bombs at No. 58 Clybourne Avenue. He was evidently slow in his preparations. Mrs. Seliger says that her husband and Lingg, and Huebner and Thielen, and Hermann, and some others, whose names she did not know, were at work on the bombs at her house until past seven o'clock.

From the fact that Seliger and Lingg were met on the way to Neff's Hall by Muenzenberger, the blacksmith, it would appear that the latter had been sent forward to hasten their movements.

The various details here related tend to show that some occurrence had taken place which had not been expected or provided for.

But notwithstanding the fact that the Monday night conspiracy may have been varied somewhat to suit the new conditions, we think the jury were warranted in believing that the bomb was thrown and the shots were fired as a part of the execution of that conspiracy.

2. The second feature of the Monday night conspiracy was the publication of the signal-word "Ruhe" in the Arbeiter Zeitung, an afternoon paper, issued every day at two o'clock. The word "Ruhe" was published in the Arbeiter Zeitung on the afternoon of Tuesday, May 4, 1886, about five hours and a half before the hour for which the Haymarket meeting was called. It appeared in the letter-box column in heavy type and heavily underscored. Its publication announced the arrival of the "social revolution." It was a call issued to the armed sections to arm themselves and repair to their meeting-places and await orders. Here certainly was an execution of a part of the conspiracy shortly before the opening of the meeting, at which the murder of Degan took place.

It is clear that the publication of the word "Ruhe" in a German paper might not be notice to the armed members of the American group, who presumably could not speak or read German. The Alarm at this time was only issued every half-month. Accordingly, on Tuesday afternoon, at about the same time when the word "Ruhe" appeared in the Arbeiter Zeitung, there also appeared in one of the afternoon English papers of the city the following notice: "American group meets to-night, Tuesday, 107 Fifth Avenue. Important business. Every member should attend; 7:30 o'clock sharp. Agitation committee."

The question which here naturally suggests itself is: Was there a gathering of the armed men at their meeting-places in obedience to the call implied in the word "Ruhe"?

The evidence does not disclose how many meeting-places there were, nor the location of all of them.

The meeting-place selected for the members of the North-

west Side group would appear to have been Wicker Park. But whether they actually met there on Tuesday night, or whether the arrangement for their doing so was given up in view of some alteration of plan, such as has already been hinted at, the record does not disclose. A large number of the members of this group were at the Haymarket on that evening.

According to the testimony of Seliger as to the declarations of Lingg, Greif's Hall, or 54 West Lake Street, was a designated meeting-place for some of the armed men. This hall was crowded on Tuesday night with workingmen, many of whom went over to the Haymarket.

It was only two blocks east from Desplaines Street, and distant only a few minutes' walk from the wagon of the speakers. A gathering there was, in effect, a gathering at the Haymarket itself.

The meeting-place for the American group on that evening was the Arbeiter Zeitung office, at 107 Fifth Avenue. Twelve or fifteen members of that group met there pursuant to the published notice.

At least six of those present, including the defendants Parsons and Fielden, belonged to the armed section.

They all left and came over to the Haymarket meeting some time between half-past eight and nine o'clock Tuesday evening.

The meeting-place of many of the armed members of the North Side group on Tuesday evening was Zepf's Hall. Lingg, Seliger, Lehmann, Smideke, Thielen, and others, were there on that evening between eight and half-past nine o'clock.

Many went there to get bombs. Thielen, who had received two loaded bombs, some cartridges, and two cigar-boxes full of dynamite from Lingg on that afternoon, was there a considerable portion of the evening, and is spoken off by Neff as "hanging around out in front of the saloon on the sidewalk."

We think the evidence warrants the conclusion that 58 Clybourne Avenue was one of the meeting-places to which the members of the armed sections repaired in pursuance of the arrangement made on Monday night.

Some of the meeting-places were to be at certain "corners." The armed men were to go from their meeting-places to attack the stations. They were to attack the stations, in order to prevent the policemen from getting out of them so as to go to the scene of conflict, when they should be summoned.

Hence, many of the meeting-places would be near the stations.

One of the stations to be attacked, and which was specifically named at the Monday night assemblage, was the North Avenue station. The evidence shows that Lingg, Seliger, Lehmann, Smideke, Thielen, and two large men belonging to the Lehr und Wehr Verein, all of whom were armed with bombs, were seen standing and moving between eight and ten o'clock on Tuesday night, at corners and on streets in the near neighborhood of the North Avenue station.

Seliger and Lingg were also that night still further north in the neighborhood of a police-station near the corner of Webster and Lincoln avenues. Others, who left 58 Clybourne Avenue just after the bombs had been deposited there, "went ahead" of Seliger and Lingg, so that the course taken by them must have been still further northward and in the neighborhood of Deering, where the defendant Schwab made a speech to some striking workingmen about ten o'clock on that night after he had left the Haymarket.

One or more of these meeting-places or corners was in the neighborhood of the Desplaines Street station. A group of about twenty-five men were standing on Tuesday evening at the southwest corner of Halsted and Randolph streets, two blocks west of the Desplaines Street station, and one of the witnesses speaks of seeing Spies and Schwab going into the thickest of this group between eight and nine o'clock. "About an hour previous to the meeting" at the Haymarket, Engel and Fischer, both members of the armed sections, were seen at the corner of Desplaines and Randolph streets. During the evening, Fischer and Waller, the latter of whom is proven to have had a revolver, and both of whom belonged to the Lehr und Wehr Verein, were so near the Desplaines Street station as to observe the mounting of five or six patrol wagons with policemen. The speakers' wagon itself was only a short distance north of that station, and armed men were gathered around it all the evening, as has already been shown.

Thus it is proven that armed men did gather at certain corners and meeting-places on Tuesday night. There is evidence which would warrant the jury in believing that such gatherings took place in obedience to the call agreed upon at the Monday night meeting.

3. The third feature of the Monday night conspiracy was the appointment of a mass meeting at the Haymarket. The

meeting was held, and its general character has already been discussed.

4. The fourth branch of the conspiracy had reference to the action of the committee that was charged with the double duty of publishing the signal-word "Ruhe," and of reporting to the armed men at their meeting-places any conflict or collision that might occur at the Haymarket or elsewhere. Did this committee attend at the Haymarket, and carry reports thence to those gathered at the "corners" and other meeting-places?

Upon the reception of these reports, attacks were to be made upon the police. The thing to be reported was any collision or conflict that might happen to occur between the police and the workingmen. Such collisions ordinarily grew out of attempts to protect employers or non-union laborers against strikers. But that an act of interference with a meeting of workingmen would be regarded as coming within the meaning of the word "conflict" or "collision," as here understood, is apparent from Lingg's statement, made to Seliger when he first brought a bomb to the latter's house, and showed him pipes and shells. This statement was, that the bombs would be used not only "on occasions of strikes," but "where there were meetings of workingmen and they should be disturbed by the police."

At the Haymarket, the collision grew out of an attempt to disperse a meeting that appeared to have been called for an illegal purpose. The movement of the police upon the crowd for the purpose of effecting this dispersion was such a coming together of policemen and workingmen as would very naturally be construed by many of the conspirators or their unlearned agents to be within the meaning of the Monday night plan. To regard the advance of the police into the midst of those standing around the wagon as authorizing and justifying the attack contemplated by the terms of the Monday night conspiracy, was a natural interpretation of those terms, in view of all the circumstances and of the character of the parties concerned.

As the march to the wagon and the order to disperse did not occur until the station had been left, the police were out of the station before the occasion for the attack arose, and hence the throwing of the bomb into the station itself was an unnecessary act.

Even if it be true that the committee already named made no report to the armed men at their meeting-places, as con-

templated by the terms of the conspiracy, it may be said that such report was unnecessary, so far as those posted near the Desplaines Street station were concerned. The only object of such reports was to give information of a conflict or collision. The armed men at the Haymarket themselves saw the collision, and heard the order to disperse, and were therefore informed of the arrival of the occasion for an attack without any report from the committee.

However this may be, the evidence tends to show that certain parties did go from the Haymarket to one or more of the meeting-places on Tuesday night, and that they so went as bearers of some message or communication. Whether the communication, suggested by this passage of persons from point to point, had any reference to the large gathering of policemen at the Desplaines Street station, does not appear.

Belthazar Rau, the advertising agent of the Arbeiter Zeitung, was one of the most active men in the promotion of the schemes of the Internationalists. As has already been stated, he exhibited a specimen bomb in August, 1885, to the central committee in session at the Arbeiter Zeitung office, when Seliger was present as a delegate. The written copy of the words "Y.—Komme Montag Abend," published in the Die Fackel on Sunday, May 2d, and calling the meeting of the armed men on Monday night, was in his handwriting. He introduced Spies to the chairman of the meeting of the lumber-shovers on Monday afternoon. He distributed the Revenge Circular Monday evening, at Zepf's Hall. He knew the meaning of the signal "Ruhe," and according to the testimony of Spies, talked with the latter about it on Tuesday afternoon. On Tuesday night he was seen moving among the crowd on the Haymarket. On that evening he made two trips between the Arbeiter Zeitung office and the Haymarket, once in company with Schwab, and again in company with Fielden, Parsons, and Snyder. He was seen at Zepf's Hall just after the explosion. He was in consultation with Spies, Schwab, Fricke, and others, at the Arbeiter Zeitung office, on Tuesday afternoon, between five and seven o'clock; and on Tuesday morning, between nine and ten o'clock, he was present at the same place with Fischer, Spies, Schwab, and Grueneberg at an interview in reference to the handbills heretofore mentioned. Gruenhut speaks of him as being on an agitation committee, and on the committee for the Interna-

tionalists. Special mention is made of him by Herr Most in his letter to Spies.

This same Rau, on Tuesday night, went from the Haymarket to the meeting of the American group, then in session at the office of the Arbeiter Zeitung, and in obedience to a notice from him, all those gathered there went over to the speaker's wagon on Desplaines Street.

Parsons, in speaking of what took place at the Arbeiter Zeitung office, says: "Some one, I understood it was a committee, came over from the Haymarket; they stated that they came from the Haymarket, or some one told me they did." Fischer stated, after his arrest, that he was at the Arbeiter Zeitung office that night, and he was a member of the executive committee that called the Tuesday night meeting, as shown by the signature to the handbill.

Thus there is evidence from which the jury were warranted in believing that Fielden and Parsons and their associates were called from their meeting-place to the Haymarket by the summons of a committee.

Furthermore, about eight o'clock, or a little before that time, on Tuesday evening, the defendant Schwab was at the office of the Arbeiter Zeitung, and several telephone messages passed between him and a letter-carrier of that paper in the northwestern part of the city. He went over to the Haymarket, and leaving there later in the evening, took a Clybourne Avenue car at the court-house, and went to Deering, at or near the corner of Clybourne and Fullerton avenues. When he arrived at his destination, he was standing on the back platform of the car. During his journey, he passed by No. 58 Clybourne Avenue, where men had just been helping themselves from the open satchel of loaded bombs, where Lingg had just inquired of Neff, the saloon-keeper, if "some one had been there asking for him," where Thielen, who had been with Lingg that afternoon, while he was making bombs, was "hanging around . . . . out in front of the saloon on the sidewalk." During this journey, he passed the intersection of Larrabee Street and Clybourne Avenue about the time when Seliger, Lingg, Smideke, and Lehmann were standing there. He passed the intersection of North Avenue with Clybourne Avenue a short distance west from the North Avenue station, which had been especially singled out for attack. His course was near the spot where two large men, armed with bombs, members of the Lehr und Wehr Verein, had been seen stand-

ing on that night, and from which they had gone ahead towards the north.

It was said at the Monday night meeting that when the police-stations should be attacked the Internationals hoped to gain accessions from the workingmen. Schwab went late on Tuesday evening to address several thousand "striking" workingmen, assembled at a point not a great distance north from the stations visited on that evening by Seliger and Lingg, and in order to reach the point in question went directly by the meeting-place of the North Side group, to which he himself belonged, and among the corners where armed members of that group had been hovering all the evening, as if in expectation of some order or signal.

There is no direct or positive evidence that he passed by No. 58 Clybourne Avenue and the corners in its neighborhood, as a member of the committee referred to, for the purpose of summoning to the Haymarket some one or more of those who had helped themselves to Lingg's bombs. But there are circumstances which, taken in connection with all the other evidence in the case, point very strongly in the direction here indicated.

The evidence of the defense tends to show that Schwab's trip to Deering had no other object than an address to the workingmen, that Rau's visit to the Arbeiter Zeitung was for the sole purpose of getting speakers for the Haymarket, and that the American group met at the office of the Arbeiter Zeitung on that evening to effect an organization of the sewing-girls. It was for the jury to say whether the evidence of the defense upon this subject was more worthy of belief than the various circumstances already detailed, which, we think, the jury had a right to look at in the light of the principles advocated by the International organization, and in the light of the peculiar methods recommended by that organization for concealing its real designs. The Arbeiter Zeitung, in its instructions "about revolutionary deeds" as found in its issue of March 16, 1885, says that where a special group is formed for the purpose of action, the public groups "have to serve as a covering, as a shield behind which one of the most effective weapons of revolution is bared"; that "the danger of discovery ought to be weakened as much as possible, and, if it can be, should be reduced to naught."

5. The fifth feature of the plan under consideration was the resolution to communicate its details to absent members.

The record furnishes no direct evidence upon this subject, but it shows that persons who were present at the meeting on Monday night were in the company of several of the defendants on Tuesday and Tuesday night. Rudolph Schnaubelt was in consultation with Schwab and Spies on Tuesday night, and was on the wagon that evening with Fielden and Parsons. During the day on Tuesday Rau and Fischer were in the Arbeiter Zeitung building with Spies and Schwab, and were there in the evening while Fielden and Parsons were in attendance upon the gathering of the American group.

We have thus reviewed somewhat in detail a number of the events of Tuesday night with a view of seeing whether they took place in accordance with and in pursuance of the provisions of the Monday night plan. Viewed as evidences of a correspondence between what was done and what was planned, some of the occurrences here noted may be unimportant, but taking all the circumstances together, the jury were justified in finding that the actors upon the stage of Tuesday night's tragedy were playing the parts assigned to them in the conspiracy of the previous night, and that the death of Degan occurred as a part of the execution of that conspiracy, and while the parties to it were engaged in carrying it out.

The last and most important question to be considered is, Were the plaintiffs in error parties to the conspiracy formed on the evening of Monday, May 3, 1886?

The jury were warranted in believing, from the evidence, that the plaintiff in error Louis Lingg was a party to the Monday night conspiracy.

According to the testimony of the captain of the police, Lingg admitted, after his arrest, that he was present on that evening in the basement of Greif's Hall. If he was, then his presence there, taken in connection with his subsequent conduct, would tend strongly to establish his connection with the plot. It is claimed by the defense that he was in attendance all the evening at a meeting of the carpenters' union at Zepf's Hall, on Lake Street at the northeast corner of Lake and Desplaines streets, two blocks west of Greif's Hall, and about half a block north of the spot where the speakers' wagon was located on the next night. He certainly was at Zepf's Hall during a part of the evening, but may have gone over to the other meeting in session at Greif's Hall. A public announcement was made to those assembled in Zepf's Hall, requesting

all who belonged to the armed sections to go over to the basement of 54 Lake Street. Schrade says he went to the latter place from the gathering of the carpenters' union because of an announcement that "the members of the L. u. W. V. should go around to the meeting on Lake Street." This announcement certainly informed Lingg that the armed sections were in session at a place just two blocks east of him.

It would make no difference, however, in view of his acts and declarations, whether he was at the meeting Monday night or not. "Though the common design is the essence of the charge of conspiracy, it is not necessary to prove that the defendants came together and actually agreed in terms to have that design, and to pursue it by common means. If it be proved that they pursued by their acts the same object, often by the same means, one performing one part and another another part of the same, so as to complete it with a view to the attainment of that same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object": 3 Greenl. Ev., sec. 93.

Let us examine some of Lingg's acts and declarations:—

The plot of Monday night required the use of bombs to carry it into effect; Lingg and his assistants were making bombs on Tuesday. He brought dynamite to Seliger's house on Friday, but made no preparations to fill bombs with it until the day of the Haymarket meeting. He knew all about the details of the conspiracy. On Tuesday night he told Seliger the meaning of the word "Ruhe," and that its insertion in the paper had been provided for in the meeting of the previous night. He took a copy of the paper at Seliger's house, and showed him the signal-word in the letter-box column. On Monday night, about the time the meetings at Zepf's Hall and Greif's Hall were adjourning, he came up behind Lehmann and several other members of the armed sections, who were standing on the sidewalk at the entrance to Greif's Hall, and reproached them for their stupidity, calling them fools and oxen. When Lehmann, who had been standing guard most of the evening on the outside to prevent intruders from entering the basement, asked him what had taken place at the meeting they were just leaving, he said, in reply, that if they wanted to know something they should come to 58 Clybourne Avenue the next evening. Lehmann did go to 58 Clybourne Avenue the next evening in obedience to this injunction. As has been already stated, Lingg carried loaded

bombs there, and spread them out, so that members of the International groups could help themselves to them. His remark to Lehmann shows that what he did on Tuesday night was done in pursuance of a resolution formed on Monday night. Thielen, Hermann, Huebner, and Lehmann, who were with him on Tuesday afternoon while he was making bombs, were all present at the Monday night meeting.

We regard it as a very significant circumstance, as showing the connection between the conspiracy of Monday night and the bomb-making of Tuesday afternoon, that parties who are proven without any contradiction whatever to have been at the meeting in the basement of Greif's Hall on Monday night, and to have belonged to the band of conspirators that met there, went to Seliger's house on the very next afternoon, and were there associated with Lingg in making the bombs that he carried to Neff's Hall Tuesday night.

It was as late as eleven o'clock on Monday night when Lingg told Lehmann and several other members of the armed sections to come the next night to Neff's Hall. It was as early as seven o'clock on the very next morning when he set Seliger to drilling holes in the bomb-shells, and instructed him to get bolts to fasten the shells together, accompanying his instructions with the statement that the bombs would be taken away that day.

Lingg said, on Tuesday afternoon, while he and his assistants were at work at the bombs, that they were to be carried to 58 Clybourne Avenue as soon as they were finished, and were to be used that night, and that they were "going to be good fodder for the capitalists, and the police when they came to protect the capitalists." When he returned to Seliger's house from the West Side at one o'clock on Tuesday, he reproached Seliger with the slow progress he had made in his work.

It may be here stated that, six weeks before this time, when Lingg first brought dynamite to Seliger's house, he remarked that every workingman should have dynamite and learn to handle it, as there was to be considerable agitation.

Between nine and ten o'clock on Tuesday night Lingg and Seliger appeared before the North Avenue station, and Lingg proposed to Seliger to throw a bomb into the station, and shoot down the policemen, two of whom were sitting in front of the building. Whether their failure to carry the proposition into effect proceeded from a want of courage, or from

disappointment at not receiving some message or signal that was expected at Neff's Hall, is not disclosed by the evidence. But the proposition itself bears a startling resemblance to the first and main feature of the Monday night plot as already noticed.

Lingg's conduct during Tuesday and on Tuesday night shows that he expected a disturbance to occur Tuesday evening. He and Seliger and Lehmann and Smideke were standing on Larrabee Street near Clybourne Avenue about half-past nine o'clock, when either Lingg or Seliger remarked that "'we should not keep together, we four,' and then we went apart." He became wild with excitement after the patrol wagon, manned with policemen, had passed him, and he had been unable to light his bomb soon enough to throw it at the wagon. After that, during the evening, he frequently referred to what was going to happen on the West Side and at the Haymarket, and was with difficulty restrained by Seliger from going to the West Side.

Seliger swears that he was present at the meeting of the carpenters' union on Monday night, and was there at the same time with Lingg; he also states that, before he went, he learned that there was to be a meeting at the Haymarket on the night of the 4th of May. It would thus appear that Fischer's proposition to hold a mass meeting at the Haymarket was the subject of consultation and arrangement among the members of the groups before he went to the gathering of the armed men on Monday night.

The proof discloses two circumstances, occurring after the explosion of the bomb on Tuesday night, which tend to show Lingg's connection with the Haymarket crime. About eleven o'clock on that evening, the Lehmanns, the Hermanns, the Hagemanns, and Hirschberger, the librarian, were in Neff's saloon. Some of them had just come from the Haymarket, and they were talking about the explosion of the bomb. In the midst of their conversation, Lingg and Seliger entered the saloon, when one Hermann said in an energetic voice to Lingg: "You are the fault of all of it"; or, "that is your fault." Thereupon, a subdued conversation took place between Hermann and Lingg. This circumstance is sworn to by both Seliger and Neff, and is competent testimony as against Lingg.

After this, when Seliger and Lingg were on their way home

from Neff's saloon, Lingg "made the remark that he was even now scolded—chided—for the work he had done."

The details of the plan adopted on Monday night, as the same are herein set forth, are proven by testimony which is uncontradicted. The evidence introduced by the prosecution as to the acts and declarations of Lingg on Tuesday and Tuesday night, and during several weeks prior thereto, are also uncontradicted by any testimony offered on the part of the defense, so far as we have been able to discover. What are the inferences to be drawn from these uncontroverted facts? The jury, who are the judges of the facts in criminal as well as in civil cases, have a right to draw from proven circumstances such conclusions as are natural and reasonable.

The intentions of men can only be determined from their acts: "Murder is the unlawful killing of a human being in the peace of the people, with malice aforethought, either express or implied": Crim. Code, sec. 140. We said, in *Davison* v. *People*, 90 Ill. 221: "Malice is always presumed where one person deliberately injures another. It is the deliberation with which the act is performed that gives it character. It is the opposite of an act performed under uncontrollable passion, which prevents all deliberation or cool reflection in forming a purpose."

Here is a man, connected with a certain organization, engaged in arming and drilling for a conflict with the police. He is experimenting with dynamite, and in the construction of bombs under the direction of armed members of that organization. He makes bomb-shells, fills them with dynamite, takes them to the meeting-place of armed members of that organization, puts them where access to them can be easily had, using such precautions as such dangerous explosives naturally require. At once, certain of these armed members, such as the two large men of the Lehr und Wehr Verein already spoken of, come forward and take bombs and go their several ways. In a little more than an hour afterwards, one of these very bombs is thrown into a crowd of policemen and explodes and kills one of them. Was not the conduct of this man, who thus coolly and carefully prepared the weapons for one definite class of men to use in the murder of another definite class of men, marked by "deliberation," as that term is defined in the authorities?

It was a fair conclusion, from the evidence, that Lingg knew that the bombs he was making would be thrown among the

police. It was a fair conclusion, from the evidence, that he intended the bombs he placed in the hall-way to be used by the members of the International groups, not only in the interest of the general movement against the police with which he was connected, but in the interest of the particular conspiracy that was concocted on Monday night.

Even if he did not know the name of the particular individual who was to throw the bomb, he knew that it would be thrown by some one belonging to the sections or groups already described, and this was sufficient to affect him with the guilt of advising, encouraging, aiding, or abetting the crime charged in the indictment.

He may not have known what particular policeman would be killed, whether Matthias J. Degan or another. But when he opened the loaded satchel at Neff's Hall on Tuesday night, that act, viewed in the light of all the antecedent, attendant, and subsequent occurrences, was virtually a designation of the body or class of men who were to be attacked. When one of such class was killed, the guilt was the same as though a person bearing a particular name had been pointed out as the victim.

Even if he did not know that one of the bombs would be thrown on that evening at a particular place called the Haymarket, it was sufficient that he knew it was to be used at that point in the city where a collision should occur between the workingmen and the police. Such a collision did occur at the Haymarket.

Counsel for the defense claim that there is no proof showing the bomb to have been thrown by any one of the members of the organization for whose use Lingg may have made it; that the bomb may have been thrown by some person outside of that organization, and having a private grievance of his own against the police; in other words, that the bomb-thrower has not been identified as a member of the conspiracy, or as a person employed by it or acting in its interest.

We think, however, that the jury were justified in believing, from the evidence, that the man who threw the bomb was either a member of the conspiracy or an agent employed by it. This appears from the facts already recited. Three circumstances especially served to identify him as being connected with the conspiracy: 1. The bomb that exploded was one of the bombs made by Lingg; 2. The bombs made by Lingg were finished and distributed so short a time

before the explosion that they could hardly have been obtained elsewhere than from his possession, or by others than those for whose use he intended them; 3. The throwing of the bomb occurred almost at the same time with the firing of the shots; the latter followed so closely upon the former that the two cannot be regarded otherwise than as parts of a joint attack, showing that the man who threw the bomb and the men who fired the shots were acting in unison with each other; this negatives the idea of independent action by an outside individual having a private grudge; the character of the attack as a joint one, and the concert of action between those making it, identify it as that kind of an attack which the conspirators planned to make. Morever, there is no evidence in the record of the making of bombs by anybody except Lingg, and those associated with him.

As to the defendants Engel and Fischer, it has already been shown that they originated the Monday night plan, and procured its adoption first by the Northwest Side group and second company of the Lehr und Wehr Verein on Sunday morning, and afterwards by the representatives of all the groups, on Monday night. They advised and induced a band of seventy or eighty armed and drilled men to enter into a plot to murder the police with bombs and pistols in a certain contingency, and to agree to certain details as to committee, signal-word, mass meeting, handbill, meeting-places, etc., with a view of carrying that plot into effect. The murder of Degan took place as the legitimate consequence of an attempt to accomplish the objects of the conspiracy originated and planned by themselves. Therefore they aided, abetted, advised, and encouraged the commission of that murder. Both were present at the Haymarket meeting on Tuesday night.

The evidence tends to show that Engel was at his home, on Milwaukee Avenue near the Haymarket, when the explosion occurred. That some of the conspirators might be at home when the collision with the police should happen was a contingency that was provided for by the terms of the plot; in the event of a collision at night, the committee appointed to watch the movement was to report to the armed men at their homes.

It has already been stated that Fischer was at the Haymarket early in the evening, and was seen walking about on Desplaines Street, and in front of the station, and was present while Fielden, the last speaker, was talking. There is testimony on the part of the prosecution tending to show that he

was in the neighborhood of the wagon, and near the mouth of Crane's Alley, when the bomb was thrown. There is also testimony on the part of the defense tending to show that at that time he was in the saloon at Zepf's Hall. Zepf's Hall was just a few steps north of the wagon, and in sight from it. The hall was crowded that night with workmen, and on the upper floors several meetings, among others that of the furniture-workers, were in session. Between it and the Haymarket, persons were passing back and forth. Fischer may have stepped into the saloon a few moments before the explosion, and may have been there at the precise moment of its occurrence, although one of the newspaper reporters, who was in the saloon at the time, says he did not see him.

It would make no difference, however, in the degree of responsibility with which Engel and Fischer are chargeable, under the facts already narrated, that they were not actually among those who stood around the wagon when the bomb was thrown. Where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all of the company are equally principals in the murder, though at the time of the act some of them were at such a distance as to be out of view, if the murder be in furtherance of the common design: Wharton on Homicide, 2d ed., sec. 338; *Williams* v. *People*, 54 Ill. 422.

On the morning after the Haymarket massacre, about ten or eleven o'clock, the defendant Fischer was arrested while coming down the stairs of the Abeiter Zeitung building. The officer found upon his person a forty-four-calibre self-acting revolver loaded, and also a file. He wore a belt and sheath under his coat, the belt having a brass buckle upon it with the letters "L. & W. V.," a buckle of the Lehr und Wehr Verein society. "The file, an old-fashioned, three-cornered file, ground to a sharp edge, very sharp on the point, with a wooden handle, was in the sheath; the revolver was stuck in a slit in the belt; there were ten cartridges in his pocket; there was also a fuse cap—a fulminating cap—in his pocket; the fulminating cap was bright." At Fischer's house, after his arrest, were found a box of nearly fifty forty-four-calibre cartridges, and a light blue blouse, such as is worn by the Lehr und Wehr Verein.

We will now consider the relations of the defendants Spies and Schwab to the Monday night plot.

By the terms of the plot, the word "Ruhe" was to be published in the Arbeiter Zeitung, as a signal to the members of the armed sections to arm themselves and gather at their meeting-places, there to be ready to attack the police when the committee appointed should give information of a disturbance. That word was published in the paper which was issued on the afternoon of Tuesday, May 4th. Its publication was the act of the defendant Spies. He wrote with his own hands the words "Brief Kasten—Ruhe," the former of which means "letter-box" in German; and, from the original manuscript so written by himself, the printers set up the type from which the words were printed in the paper of Tuesday afternoon. "Ruhe" was not only in his handwriting, but he underscored it twice, as if to give it greater emphasis and prominence. If he knew its meaning as a signal-word, and the object of its insertion in the paper, as explained on the night before by his own foreman, the defendant Fischer, then he was lending himself by its publication to the execution of the plan of Monday night. "Nor is it necessary to prove that the conspiracy originated with the defendants, or that they met during the process of the concoction; for every person entering into a conspiracy or common design, already formed, is deemed in law a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design": 3 Greenl. Ev., sec. 93.

There is evidence tending to prove that Spies inserted this word in the International organ as a member of the committee whose business it was to do so, because that same committee was in charge of the Haymarket meeting, and he was the most active man in the management of that meeting. He himself inserted among the editorial notices in the Arbeiter Zeitung on Tuesday afternoon the following notice in almost the same words used in the handbill printed by Fischer: "Attention, workingmen! Grand mass meeting this evening at half-past seven o'clock, on the Haymarket, Randolph, between Desplaines and Halsted streets. Good speakers will denounce the latest rascally deed of the police in killing our brethren yesterday afternoon,—in shooting our brethren yesterday afternoon." He organized the Haymarket meeting, and addressed it. He mounted the wagon and called for Parsons. He selected as the speakers' stand the wagon, with all its advantages of location, as already specified. He moved among the workingmen on the Haymarket, and pressed them

north into Desplaines Street, to the neighborhood of the wagon so selected. In his address he spoke confidently as to the intentions of the committee charged with the double duty already indicated, saying, among other things: "The committee that called the meeting wanted to tell you certain facts," etc.

In explanation of the publication of the word "Ruhe," the defendant Spies swears that its meaning was stated to him for the first time by Rau, his advertising agent, and Fischer, his foreman, on Tuesday afternoon after its appearance in the paper, and that he instructed them to speak to the armed men of its insertion at that time as a mistake. Rau and Fischer were not placed upon the stand to confirm this explanation, and whether it was credible, in view of his printed utterances on that day, and several previous days, and in view of all the other features of his conduct, as disclosed in the record, was a matter for the jury to determine. If they did not believe his explanation as against the evidence, which tended to contradict it, then they were justified in finding, from the circumstances already mentioned, and those hereafter stated, that he was as much a party to the plot as Engel and Fischer and Lingg.

That plot, as has already been shown, contemplated the throwing of a bomb into each police-station, and then, in the confusion, using fire-arms against the policemen. In an article upon the riot of Monday afternoon, written by the defendant Spies, and published in the same Tuesday afternoon edition in which the word "Ruhe" appeared, he says: "If brothers who defended themselves with stones (a few of them had little snappers in the shape of revolvers) had been provided with good weapons, and one single dynamite bomb, not one of the murderers would have escaped his well-merited fate." Here is a suggestion of that very mode of attacking the police which was the main feature of the Monday night conspiracy. This suggestion was made to the workingmen Tuesday afternoon. Tuesday night the very thing suggested took place,—that is to say, a bomb was thrown, not into a station, but among the police a few feet from a station, and after it was thrown, "good weapons" were fired into them, killing several and wounding several more. The article in question did not stop, however, with a suggestion of an attack upon the police in the mode specified. It closed by saying: "Last night thousands of copies of the following circular were dis-

tributed in all parts of the city," and then quoted and republished in full the German portion of the Revenge Circular that had been composed by Spies, and distributed among the workingmen on Monday night, thereby urging such workingmen in the most vehement terms to arm themselves and make war upon the police. A translation of this German circular is given hereafter.

The reason why the plan of Monday night provided for throwing a bomb into each police-station and shooting the escaping policemen was, that the latter might be thereby prevented from going to the scene of the disturbance which was expected to take place. Such plan would naturally be based upon information that the police intended to hold themselves in readiness at their stations for a summons to some point of conflict. On the afternoon of April 30, 1886, being the Friday preceding the Tuesday on which the Haymarket meeting occurred, the Arbeiter Zeitung, in an editorial written by one or the other of its two editors, Spies and Schwab, thus addressed its three thousand six hundred readers among the members of the International groups and the unions of the workingmen:—

"As we are informed from reliable source, the police have received secret orders to keep themselves prepared in their stations, as a labor conflict is feared on Saturday of next week. You see the capitalistic sluggards are thirsty for the blood of workingmen. The workingmen will not permit themselves to be kicked by them like dogs any more. They will not be tortured to death any more by unlimited work, and they will not be starved any more. For this opposition they want vengeance, and they cry for blood. May be that this cry will be heeded,—but then, beside the red life-sap of the extortioner's victim, there may flow a little of the black-dragon poison of the extortioner. To the workingmen we again say at this hour, arm yourselves! You have but one life to lose. Defend that with all means. And in this connection we want to caution the armed workingmen as yet to conceal their arms, so that they will not be stolen by the minions of the law, as it has happened in various instances."

Here was a statement that the police had "received secret orders to keep themselves prepared in their stations" for a labor conflict expected to occur in about a week, which statement was accompanied with a caution to the workingmen to arm themselves and to conceal their arms. The injunction to arm could have had no other object than to meet the preparations

which the police had received secret orders to make. Such preparations could be of no avail, if the stations should be blown up and the police themselves should be shot down. Therefore, the plan of Monday night was exactly adapted to rendering the action of the police in keeping themselves prepared in their stations useless and of no effect. So exactly does the plan in question fit the state of things spoken of in the editorial of April 30th, that it would appear to have been suggested by that editorial.

When it is remembered that on the very day on which this editorial made its appearance, Lingg brought to Seliger's house the large box of dynamite already alluded to, and that on the next Sunday morning, Fischer, who, as foreman of the Arbeiter Zeitung, was all the time at work under the eyes of Spies and Schwab, went in company with Engel to a meeting of the second company of the Lehr und Wehr Verein and the Northwest Side group, where the plan for destroying the stations and their occupants was adopted upon the suggestion of Engel, it would appear that the defendants Spies and Schwab not only joined the conspiracy now under discussion after it was formed, but inspired the conception of it before it was formed.

The armed men, who met and entered into that conspiracy on Monday evening, were called together by the Arbeiter Zeitung, of which Spies and Schwab were the editors and managers. In the edition called Die Fackel, issued on Sunday, May 2d, and in the issue of the afternoon of Monday, May 3d, there were published, in the letter-box column, the words: "Y.—Komme Montag Abend" ("Y.—Come Monday night"). This was a summons to the armed sections to meet, as they did, on Monday night, at Greif's Hall. The original manuscript, from which the words were printed for the Sunday issue, was in the handwriting of Rau, advertising agent of the Arbeiter Zeitung, member with Spies of the bureau of information, and distributer for Spies of the Revenge Circular. The printing of the call twice, on both Sunday and Monday, indicated the importance of the matters to come before the meeting.

In his testimony, Spies says of the Revenge Circular: "I wrote it to arouse the working people, who are stupid and ignorant, to a consciousness of the condition that they were in." In the circular as above quoted, he uses the words: "Avenge the atrocious murder which has been committed upon your

brothers to-day [Monday], and which will likely be committed upon you to-morrow [Tuesday]." In the minds of "stupid and ignorant" workmen, already excited about the eight-hour day of labor, the language here quoted could mean nothing else than that an attack, similar to the one which took place in the southwestern part of the city on Monday, would probably be made upon the workingmen by the police on Tuesday.

Again, in the issue of the Arbeiter Zeitung, published on Sunday, May 2d, it is said: "Everything depends upon quick and immediate action. The tactics of the bosses are to gain time; the tactics of the strikers must be to grant them no time. By Monday or Tuesday the conflict must have reached its highest intensity, else the success will be doubtful. Within a week the fire — the enthusiasm — will be gone, and then the bosses will celebrate victories." Here is another designation of Tuesday as the day when the excitement would be the most intense. The conduct of Spies and Schwab during the few days preceding May 4th, and on that day, as evinced by their utterances in the Arbeiter Zeitung and otherwise, shows a constant effort to increase the enthusiasm to the highest pitch.

They advised "stupid and ignorant" workingmen to arm themselves, and then sought by vehement appeals to urge them on to "quick and immediate action." For instance: —

On Wednesday, April 28th, they said: "The power of the associate manufacturers and their state must be met by labor associations. The police and soldiers who fight for that power must be met by armed armies of workingmen; the logic of facts requires this; arms are more necessary in our times than anything else. Whoever has no money, sell his watch and chain to buy fire-arms for the amount realized. Stones and sticks will not avail against the hired assassins of the extortionists. It is time to arm yourselves."

On Thursday, April 29th, they said: "If the legitimate means of the thieves and scoundrels who practice extortion on their fellow-men are exhausted, then they resort to force. A wage-slave, who is not utterly demoralized, should always have a breech-loader and ammunition in his house."

On Friday, April 30th, they said what has already been quoted from the editorial of that date, and on the same day they further said, in another article: "What will the 1st of May bring? The workingmen bold and determined. . . . .

Men of labor, so long as you acknowledge the gracious kicks of your oppressors with words of gratitude, so long you are faithful dogs. . . . . They are enraged, and will attempt, through hired murderers, to do away with you like mad dogs."

On Saturday, May 1st, they again said to the workingmen in the Arbeiter Zeitung: "Away with all rolls of membership and minute-books, where such are kept. Clean your guns, complete your ammunition. The hired murderers of the capitalists, the police and militia, are ready to murder. No workingman should leave his house in these days with empty pockets."

On Sunday, May 2d, in the same editorial which urged quick and immediate action, and designated Monday or Tuesday as the time when the conflict would have reached its highest intensity, they used the following language: "Everywhere the workingmen are willing to accept a corresponding reduction of wages with the introduction of the eight-hour system; they were mostly refused. 'No, ye dogs; you must work ten hours; that's the way we want it; we're your bosses.' Something like this was the answer of the majority, translated into intelligible language. In the face of this fact, it is pitiful and disgusting, but more than that, it is treacherous, to warn the strikers against energetic, uncompromising measures."

On Monday, May 3d, in another article in the Arbeiter Zeitung, they said: "The freight-handlers were marching in full force from depot to depot at noon to-day. It was rumored that 'scabs' had been imported from Milwaukee. The railroad depots are occupied by special policemen, while the municipal minions of order, under the command of five lieutenants, have entrenched themselves in the armory. The arch-rascals have made provisions for good victuals and drink. . . . . A strike will probably take place in the lumber districts. . . . . The number of strikers to-day cannot be determined, but will probably amount to forty thousand. Courage, courage is our cry. Don't forget the words of Herways: The host of the oppressors grows pale, when thou, weary of thy burden, in the corner puttest the plow, when thou sayest 'it is enough.'"

But there were other occurrences during the same period which tended to incite the workingmen to an attack upon the police.

While Fischer, the first foreman in the compositors' room of the Arbeiter Zeitung, was present at the Sunday morning

meeting on Emma Street, Urban, a compositor of the Arbeiter Zeitung, was attending a meeting of the Central Labor Union at No. 54 West Lake Street, in a room back of the saloon. Spies was present at a second meeting of the Central Labor Union at the same place in the afternoon of the same Sunday.

It was arranged at these morning and afternoon gatherings of the Central Labor Union that Spies should address the meeting of the striking lumber-shovers, to be held the next afternoon on the "Black Road," in the near neighborhood of a large manufacturing establishment in the southwestern part of the city.

On Monday afternoon the meeting in question took place. It has already been referred to. The lumber-shovers were "on a strike," and met to hear reports from certain committees, whom they had appointed to negotiate with their employers in reference to the eight-hour movement. The immense crowd in attendance upon this occasion was addressed by Spies, as has already been stated. He spoke in the German language from the top of a freight-car. His manner was excited and his gestures were violent. One of the witnesses says that while speaking "he jumped up three or four feet high." About three blocks west from the place where he was speaking was situated the factory which was employing non-union laborers, as heretofore explained. The lumber-shovers at the meeting were not connected in any way with the workingmen engaged at the factory. But when the latter came out of the factory gate about three o'clock in the afternoon at the ringing of a bell an attack was made upon them by several thousand of the lumber-shovers, who rushed from the freight-car towards the gate, before the speaking was finished, in obedience to an order from some one on the car. A conflict ensued. The police were called out. Stones were thrown, clubs were used, and pistols were fired by both the crowd and the police. Some of the policemen and several of the workingmen were wounded. One of the latter was killed, as has been heretofore mentioned.

It is admitted by the defendant Spies that upon this occasion he urged the workingmen, many of whom were armed with revolvers, to resist the attempt of the police to quell the riot. In an account of what took place, written by himself and published on the next afternoon (Tuesday, May 4th) in the Arbeiter Zeitung, he says:—

"The writer of this hastened to the factory as soon as the first shots were fired, and a comrade urged the assembly to hasten

to the rescue of their brothers, who were being murdered, but no one stirred. . . . . The writer ran back. He implored the people to come along,—those who had revolvers in their pockets,—but it was in vain. With an exasperating indifference they put their hands in their pockets and marched home, babbling as if the whole affair did not concern them in the least. The revolvers were still cracking, and fresh detachments of police, here and there bombarded with stones, were hastening to the battle-ground. The battle was lost!"

On Tuesday afternoon, Spies inserted in his paper a call for the Haymarket meeting, in order to denounce the action of the police at this very riot. The Haymarket meeting was thus nothing more than a continuation of the warfare on the police which he himself had incited and taken part in on Monday afternoon.

After his return from the "Black Road" to the Arbeiter Zeitung office on Monday afternoon, May 3, 1886, he wrote in English the following address, all of which, except the word "revenge" at the top, is proven to have been in his handwriting:—

"REVENGE.

"Workingmen, to Arms!!

"The masters sent out their blood-hounds,—the police; they killed six of your brothers at McCormick's this afternoon. They killed the poor wretches because they, like you, had the courage to disobey the supreme will of your bosses. They killed them because they dared ask for the shortening of the hours of toil. They killed them to show you, 'free American citizens,' that you must be satisfied and contented with whatever your bosses condescend to allow you, or you will get killed!

"You have for years endured the most abject humiliations; you have for years suffered unmeasurable iniquities; you have worked yourself to death; you have endured the pangs of want and hunger; your children you have sacrificed to the factory lord; in short, you have been miserable and obedient servants all these years! Why? To satisfy the insatiable greed, to fill the coffers of your lazy, thieving masters! When you ask them now to lessen your burdens, he sends his blood-hounds out to shoot you,—kill you! If you are men, if you are the sons of your grandsires, who have shed their blood to free you, then you will rise in your might, Hercules, and destroy the hideous monster that seeks to destroy you. To arms, we call you, to arms! YOUR BROTHERS."

He at the same time wrote an address in the German language, of which the following is a translation:—

"REVENGE! REVENGE!

"Workmen, to Arms!

"Men of labor, this afternoon the blood-hounds of your oppressors murdered six of your brothers at McCormick's. Why did they murder them? Because they dared to be dissatisfied with the lot which your oppressors have assigned to them. They demanded bread, and they gave them lead for an answer, mindful of the fact that thus people are most effectually silenced. You have, for many, many years, endured every humiliation without protest, have drudged from early in the morning till late at night, have suffered all sorts of privations, have even sacrificed your children. You have done everything to fill the coffers of your masters,—everything for them! And now, when you approach them and implore them to make your burden a little lighter, as a reward for your sacrifices, they send their blood-hounds, the police, at you, in order to cure you, with bullets, of your dissatisfaction. Slaves, we ask and conjure you, by all that is sacred and dear to you, avenge the atrocious murder which has been committed upon your brothers to-day, and which will likely be committed upon you to-morrow. Laboring men, Hercules, you have arrived at the cross-way. Which way will you decide? For slavery and hunger, or for freedom and bread? If you decide for the latter, then do not delay a moment; then, people, to arms! Annihilation to the beasts in human form who call themselves rulers! Uncompromising annihilation to them! This must be your motto. Think of the heroes whose blood has fertilized the road to progress, liberty, and humanity, and strive to become worthy of them!

"YOUR BROTHERS."

These two addresses were printed, one in the English and the other in the German language, upon the same sheet of paper, and one above the other, as one circular. The printers in the Arbeiter Zeitung office usually stopped work at five o'clock in the afternoon. On this particular Monday afternoon, however, five or six of them were detained to set up the type for this circular. By direction of Spies, the form was sent across the street to a printing-office at No. 88 Fifth Avenue. The order was given to strike off as many as possible. Twenty-five hundred copies were printed that evening. As soon as they came from the hands of the printer they were

carried away. "A dozen different parties came there after them, coming one and two at a time, taking it as fast as it came from the press."

These circulars were distributed on Monday evening, at various places, and in different parts of the city.

One of the witnesses says: "It was a few minutes after six o'clock . . . . on Monday afternoon. I was standing in the doorway of the entrance of 54 West Lake Street, talking with the proprietor of the hall, and first had my attention attracted to a circular by seeing a few of them flying through the air, and remember distinctly picking up one and reading it at the time. Just at the moment I saw a horseman, and the distribution of the circulars was coincident with the appearance of the horseman in front of 54 West Lake Street. My impression was that the horse was ridden west on Lake Street." Later in the evening, the circulars were handed around at Greif's Hall, in the saloon, and at the meeting of the armed sections, which was in session in the basement. On the same night there was a gathering of the members of the carpenters' union, to the number of one thousand or eight hundred men, at Zepf's Hall, at the corner of West Lake and Desplaines streets, as heretofore stated, and the Revenge Circulars were brought there and distributed by Rau, the advertising agent of the Arbeiter Zeitung. Between nine and ten o'clock, the defendant Neebe carried a number of copies to a saloon at the corner of Franklin and Division streets, in the North division of the city, and laid some on the counter, and some on the tables as hereafter stated.

A copy was seen by one of the witnesses at a meeting that night of the metal-workers, at No. 99 West Randolph Street.

Another witness says that he was walking west on Randolph Street, Tuesday evening, about half-past seven o'clock, and somebody handed him a circular headed "Revenge," and signed "Your Brothers."

That this circular gave impulse to the action of the members of the armed sections at the Monday night meeting, and inspired the adoption of the plan agreed upon, is apparent from the fact that its contents were fully discussed and dwelt upon at that meeting.

The witness Gruenhut says that he was at the Arbeiter Zeitung office between five and seven o'clock on Monday afternoon; that Schwab and the book-keeper and Neebe (though he is not so sure about the latter) were present, while Spies

was writing the Revenge Circular, and reading the proof-sheets of it as they came from the hands of the printer; that Spies told them of the lumber-shovers' riot, from which he had just come, and of the killing of six men by the police, and deplored the fact that the workingmen had not been better armed for their defense, favoring the use of dynamite as the most effective mode of arming; that the calling of a mass meeting was then discussed and agreed upon among them, and it was agreed that the meeting should be held at night, and be in the open air; that the circulars which Spies was preparing were to be printed "for distribution for the mass meeting"; that the Haymarket meeting held Tuesday night was the meeting talked about and agreed upon on that Monday afternoon.

Grueneberg says that he saw Fischer in the compositors' room of the Arbeiter Zeitung as late as half-past five o'clock on Monday evening, and when it is remembered that Fischer went to the meeting at Greif's Hall that night, and induced the armed men to agree to the holding of an open-air meeting on Tuesday night at the Haymarket, and himself printed and caused to be circulated a handbill, calling on the workmen to come armed to that meeting, and when it is further remembered that the signal-word "Ruhe," which the armed men that night agreed upon at his suggestion, was next day written by Spies with his own hand, and published in the Arbeiter Zeitung on Tuesday afternoon, the jury certainly had reasonable ground for believing that the action of Fischer on Monday night was taken in consequence of and pursuant to the arrangements decided upon between Spies, Schwab, and others at the Arbeiter Zeitung office Monday afternoon.

This conclusion receives confirmation from the character of the articles, which appeared in the Arbeiter Zeitung on Tuesday afternoon.

The following editorial, published on May 4, 1886, and called the "to arms" editorial, was written by the defendant Schwab:—

"Blood has flowed. It happened as it had to. Order has not drilled and disciplined her murdering hounds in vain. The militia has not been drilled in street-fighting for mere sport. The robbers, who know best themselves what a mean rabble they are who keep up their mammon by rendering the masses wretched, who make the slow murdering of laboring men's families their vocation, they are the last to be afraid of

directly butchering the laboring men. 'Down with the rabble,' is their watchword. Is it not an historical fact that private property has had its origin in acts of violence of all sorts? And shall the 'rabble,' the laboring men, allow this capitalistic pack of robbers to carry on, through hired assassins, their bloody orgies? Nevermore! The war of classes has come. In front of McCormick's factory workmen were shot down yesterday, whose blood cries for vengeance. Who will any longer deny that the ruling tigers are thirsting for the workman's blood? Countless victims have been slaughtered upon the altars of the golden calf, amidst the triumphant shouts of the capitalistic band of robbers. One has only to think of Cleveland, New York, Brooklyn, East St. Louis, Fort Worth, Chicago, and countless other places, in order to recognize the tactics of the extortioners. It is: 'Terror to our working cattle.' But the laborers are not sheep, and the white terror will be answered with the red. Do you know what that means? Very well, you will find that out yet.

"Modesty is a vice of the workingman; and can there be anything more modest than this eight-hour demand? Peaceably the workmen made it already a year ago, in order not to neglect to give the extortioner opportunity to prepare for it; and the answer to this was, to drill the police force and the militia, and to browbeat the laborers who worked in favor of the eight-hour system. And yesterday blood flowed. This is the manner in which these devils reply to a modest petition of their slaves.

"Death, rather than a life of wretchedness! If workmen must be shot at, well, then, let us answer them in a manner which the robbers will not soon forget again. The murderous capitalistic beats have become drunk with the smoking blood of laborers. The tiger lies ready for the jump; his eyes sparkle, eager for murder; impatiently he whips his tail, and the sinews of his clutches are drawn tight. Self-defense causes the cry, 'To arms! To arms!' If you do not defend yourselves, you will be torn in pieces and ground by the animal's teeth. The new yoke which awaits you in case of cowardly retreat is heavier still and harder than the severe yoke of slavery as it exists now.

"All the powers hostile to the workmen have been [made] common cause. They recognize their common interest. They have the necessary class-consciousness. In such days as ours are, everything else must be subordinated to this one thought,

How can the thieving ——, together with their gangs of hired murderers, be made harmless?

"The whole newspaper gang makes up the lie to-day that the strikers, who were in the neighborhood of McCormick's factory yesterday, were the first to fire. That is a bold, barefaced lie on the part of the journalistic ragamuffins. Without any warning whatever they fired at the workmen, when they of course returned the fire. Indeed, why should they make so much ado about the rabble? To be sure, if they had been sheep or cattle instead of human beings, one might have reflected a little before shooting. But as it was, a laboring man is quickly replaced, and the gluttons then at their rich dinners and in the circles of their mistresses boast of the splendid achievements of law and order.

"In the poor shanty, miserably-clad women and children are weeping for husband and father. In the palace they touch glasses filled with costly wine, and drink to the happiness of the bloody bandits of law and order. Dry your tears, ye poor and wretched; take heart, ye slaves; arise in your might and overthrow the system of robbery, present order based on robbery."

The following is a portion of the article already quoted from, which was written by the defendant Spies and published in the Arbeiter Zeitung on Tuesday, May 4, 1886: —

"Six months ago, when the eight-hour movement began, there were speakers and journals of the I. A. A. who proclaimed and wrote: 'Workmen, if you want to see the eight-hour system introduced, arm yourself! If you do not do this you will be sent home with bloody heads, and birds will sing May songs upon your graves.' ('That is nonsense,' was the reply.) 'If the workmen are organized they will gain the eight hours in their Sunday clothes.' Well, what do you say now? Were we right or wrong? Would the occurrence of yesterday have been possible if our advice had been followed?

"Wage-workers, yesterday the police of this city murdered at the McCormick factory, so far as it can now be ascertained, four of your brothers, and wounded more or less seriously some twenty-five more. If brothers who defended themselves with stones (a few of them had little snappers in the shape of revolvers) had been provided with good weapons and one single dynamite bomb, not one of the murderers would have escaped his well-merited fate. As it was, only four of them were disfigured. That is too bad. The massacre of yesterday

took place in order to fill the forty thousand workmen of this city with fear and terror, — took place in order to force back into the yoke of slavery the laborers who had become dissatisfied and mutinous. Will they succeed in this? . . . . About seventy-five well-fed, large, and strong murderers, under the command of a fat police-lieutenant, were marching toward the factory, and on their heels followed three patrol wagons besides, full of law and order beasts; two hundred policemen were on the spot in less than ten or fifteen minutes, and the firing on fleeing workingmen and women resembled a promiscuous bush-hunt. . . . . A few of the strikers had little snappers of revolvers, and with these returned the fire. . . . . With their weapons, mainly stones, the people fought with admirable bravery. They laid out half a dozen blue-coats, and their round bellies, developed to extreme fatness in idleness and luxury, tumbled about, groaning on the ground. Four of the fellows are said to be very dangerously wounded; many others, alas! escaped with lighter injuries. (The gang, of course, conceals this, just as in '77 they carefully concealed the number of those who were made to bite the dust.) But it looked worse on the side of the defenseless workmen. Dozens who had received slight shot-wounds hastened away amid the bullets which were sent after them. The gang, as always, fired upon the fleeing, while women and men carried away the severely wounded. How many were really injured and how many were mortally wounded could not be determined with certainty, but we think we are not mistaken when we place the number of mortally wounded at about six, and those slightly injured at two dozen. We know of four, one of whom was shot in the spleen, another in the forehead, another in the breast, and another in the thigh. A dying boy, Joseph Doedick, was brought home on an express-wagon by two policemen."

Also in the issue of the Arbeiter Zeitung of Tuesday, May 4, 1886, appeared the following: —

"An outbreak was expected on the Southwest Side this morning. A regiment of militia and the whole municipal gang of murderers were held in readiness. Just stir, ye free workmen of America, if you want to be shot down."

In the same issue of the Arbeiter Zeitung of May 4, 1886, also appeared the following: —

"The heroes of the club dispersed with their cudgels yesterday, in the most brutal manner, a crowd of girls, many of

whom had scarcely outgrown their baby-shoes. Whose blood does not rush quicker through the veins when he hears of this atrocity of the minions of the law? He who is a man, show it these days. Men, to the front!

"The armory on Lake Michigan is guarded by militia tramps. The youngsters say they are fully equipped. Should the anarchists venture an attack from any point, they would find a warm reception. Well, as long as the youngsters are in their barracks, they will probably not be molested. But if they appear in the streets, circumstances might be altered."

The Alarm and the Arbeiter Zeitung were more than mere newspapers to the members of the International Association. They were the organs of that association. The members looked to those papers for orders and directions. More especially was this the case with the Arbeiter Zeitung and its German readers. The record contains many evidences of this fact.

The seventy or eighty armed men who assembled in the basement of Greif's Hall, and their absent confederates, who were to be informed of their conspiracy, were to look for the word "Ruhe" in the Arbeiter Zeitung. From that paper they were to learn when the social revolution had come, and when they were to assemble for conflict. This showed that they were in the habit of reading that paper and consulting it. When a special meeting of the armed sections was desired, they who belonged to those sections found the signal-words calling them together in the Arbeiter Zeitung. This implied that they were readers of that paper. The seventy or eighty men just referred to went to Greif's Hall because they saw the summons to go there in their organ. Some of them testify that they went there for that reason, and there is no evidence that they received any other notice of the Monday night meeting than the one published in the Arbeiter Zeitung. The assemblage of seventy or eighty of them there may be regarded as proof that seventy or eighty of them read the paper in question on Sunday and Monday.

Many witnesses in this case, both for the state and for the defense, who testify to their membership in the International Association, testify also to the fact that they were in the habit of reading one or the other of the two organs here referred to.

Waller, a member of the Lehr und Wehr Verein, who presided at the gathering in the basement of Greif's Hall, and who was armed with a revolver at the Haymarket on Tuesday

night, says that he saw the word "Ruhe" in the Arbeiter Zeitung at six o'clock Tuesday afternoon in a saloon on Milwaukee Avenue, and that on Monday he saw the words "Y.—Komme Montag Abend," in the same paper.

When Lingg desired to explain to Seliger the disturbance that was expected on the West Side, he went to the Arbeiter Zeitung and showed the word "Ruhe."

Without going further into the testmony, we think the jury were warranted in believing that most of the editorials in these papers, which were generally in the form of appeals or addresses to the workingmen, were read at least by those of the workingmen who belonged to the groups herein mentioned. More especially were these organs consulted during the excitement of the eight-hour movement, when information as to the progress of that movement was eagerly sought after among the classes affected by it.

As already stated, the weight of the evidence is in favor of the conclusion that Degan was killed by some member of the International Association. It was for the jury to say how far that fatal result may have been brought about through the influence of the utterances put forth by the organs here designated.

As late as Tuesday afternoon, Spies said to the workingmen, in an editorial in his paper, proven to have been written by himself: "Then, do not delay a moment; then, people, to arms! Annihilation to the beasts in human form who call themselves rulers!"

As late as Tuesday afternoon, Schwab said to the workingmen, in an editorial in the same paper, proven to have been written by himself: "The murderous capitalistic beats have become drunk with the smoking blood of laborers. The tiger lies ready for the jump; his eyes sparkle, eager for murder; impatiently he whips his tail, and the sinews of his clutches are drawn tight. Self-defense causes the cry, 'To arms! To arms!' If you do not defend yourselves, you will be torn in pieces and ground by the animal's teeth."

"He who inflames people's minds, and induces them by violent means to accomplish an illegal object, is himself a rioter, though he take no part in the riot": *Regina* v. *Sharpe*, 3 Cox C. C. 288.

"One is responsible for what wrong flows directly from his corrupt intentions. . . . . If he set in motion the physical power of another, he is liable for its result. If he contem-

plated the result, he is answerable, though it is produced in a manner he did not contemplate. . . . . If he awoke into action an indiscriminate power, he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what he might have foreseen would be the understanding, he is responsible": 1 Bishop's Crim. Law, sec. 641.

We conceive that it can make no difference whether the mind is affected by inflammatory words addressed to the reader through the newspaper organ of a society to which he belongs, or to the hearer through the spoken words of an orator whom he looks up to as a representative of his own peculiar class: *Queen* v. *Most*, L. R. 7 Q. B. D. 244.

It was a question for the jury whether, with the evidence before them, the attack upon the police at the Haymarket "was so connected with the inflammatory language used that they cannot be separated by time or other circumstances."

We do not wish to be understood as deciding that the influence of these publications in bringing about the crime at the Haymarket could be considered by the jury, if they were the only evidence of encouragement of that crime which was furnished by the record. We only hold that the jury were at liberty to consider the publications in question in connection with all the other facts and circumstances of this particular case, and as a part of those facts and circumstances, with a view of determining whether the defendants, who were responsible for their issuance, did or did not belong to the conspiracy now under consideration.

It has already been stated that the defendant Schwab was present at the Haymarket a part of Tuesday evening, but left and went to Deering, where he made a speech. What he said in that speech is not disclosed by the record. The proof shows that those who called the Haymarket meeting expected an attendance of twenty-five thousand workingmen at that place. As matter of fact only about two thousand came. Several thousand had assembled at Deering. That Schwab went to Deering, and there addressed some of the workingmen who were expected at the Haymarket, but failed to come, would in no wise lessen his responsibility for the death of Degan, if his acts and declarations, as heretofore and hereafter noticed, helped to cause that death. If he belonged to the same conspiracy with Degan's murderer, and the murder of Degan was perpetrated in furtherance of that conspiracy, then the

act of the murderer was his act. It is to be noted that he did not go to Deering until he first went to the Haymarket, and had a consultation with one or more of the leaders who had control of matters at the latter place. But a further consideration of this branch of the case will be postponed for the present.

Spies spoke to the crowd at the Haymarket. One of the witnesses says that in his speech he dwelt upon the occurrences of Monday afternoon at the lumber-shovers' meeting, and the part he took in them, and then "advised the using of violent means by the workingmen to right their wrongs; that law and government were the tools of the wealthy to oppress the poor; that the ballot was no way in which to right their wrongs; that by physical force was the only way in which they could right their wrongs."

The following is another portion of his speech, as testified to by a witness who heard it:—

"The fight is going on. Now is the chance to strike for the existence of the oppressed classes. The oppressors want us to be content; they will kill us. The thought of liberty which inspired your sires to fight for their freedom ought to animate you to-day. The day is not far distant when we will resort to hanging these men. [Applause, and cries of "Hang them now!"] —— is the man who created the row Monday, and he must be held responsible for the murder of our brothers. [Cries of "Hang him!"] Don't make any threats. They are of no avail. Whenever you get ready to do something, do it, and don't make any threats beforehand. There are in the city to-day between forty and fifty thousand men locked out because they refuse to obey the supreme will or dictation of a small number of men. The families of twenty-five or thirty thousand men are starving because their husbands and fathers are not men enough to withstand and resist the dictation of a few thieves on a grand scale, to put out of the power of a few men, to say whether they should work or not. Would they place their lives, their happiness, everything, out of the arbitrary power of a few rascals? . . . . To say whether you shall work or not, you place your lives, your happiness, everything, out of the arbitrary power of a few rascals who have been raised in idleness and luxury upon the fruits of your labor. Will you stand that?"

Still another witness says: "He talked about the police, the blood-hounds of the law, shooting down six of their brothers,

and he said: 'When you get ready to do something, do it, and don't tell anybody you are going to.' . . . . At the time Mr. Spies was showing them how the officers came down the Black Road and commenced shooting into the crowd of workingmen, ... they appeared very much excited in the neighborhood of the wagon and in the neighborhood where they hallooed out, 'Let us hang them!'"

The observations hereafter made in regard to the speech of the defendant Parsons and its effect apply also to this speech of the defendant Spies.

The evidence thus far commented upon in reference to the acts and declarations of the defendants Spies and Schwab is such that the jury were warranted in finding them to be parties to the conspiracy. In addition, however, to the facts and circumstances already noticed, there was other testimony, introduced by the state for the purpose of proving that the defendants Spies and Schwab, either one or both of them, gave the bomb that killed Degan into the hands of the person who threw it, and aided him in his murderous design.

Malvern M. Thompson testifies that he saw Spies and Schwab together in Crane's Alley on the night of the Haymarket meeting, and heard the words "police" and "pistols" uttered in a conversation between them; that Spies said to Schwab: "Do you think one is enough, or had n't we better go and get more?" that they came out of the alley and walked together west on Randolph Street to the southwest corner of Randolph and Halsted streets, where they entered the thickest of a crowd of about twenty-five men, remaining there some three minutes, and then returning to Desplaines Street; that on the way back the word "police" was again used, and Schwab said to Spies: "Now, if they come, we will give it to them"; that upon their return Rudolph Schnaubelt met them on the sidewalk near the wagon, and Spies handed Schnaubelt something, which the latter put in his pocket on the right-hand side; that Spies then mounted the wagon and began to speak; that just after him, Schnaubelt also mounted the wagon, and sat upon it with his hands in his pockets until Fielden began to speak, when the witness left.

The witness did not know what it was that was handed to Schnaubelt; but, upon the assumption that he tells the truth, it was evidently something that was to be used against a body of policemen, and as a bomb with a projecting fuse is made to be thrown into a crowd of men, the jury, looking at the cir-

cumstance here noted in the light of all the other facts and circumstances developed by the testimony in the case, were warranted in believing that the thing given to Schnaubelt was a bomb. Therefore the evidence of Thompson, if true, tends very strongly to convict Spies and Schwab of aiding and abetting the crime of the Haymarket.

Schwab testifies that while he was at the Arbeiter Zeitung office on that evening a call came through the telephone for a speaker to address the meeting at Deering, and that he at once went over to the Haymarket to consult with Spies about it; that he failed to find Spies, and did not see him or talk with him at all; that he met Schnaubelt, his brother-in-law, and after talking with him about sending a speaker to Deering, concluded to go himself; that he thereupon took a Randolph Street car and went east to the court-house, there boarding a Clybourne Avenue car for the north.

The testimony in regard to the matters about which Thompson testifies is very conflicting. There is much that tends to confirm him and much that tends to contradict him.

1. As to the proof tending to confirm Thompson: It is established beyond question that Schwab went to the Haymarket for the express purpose of seeing Spies; that Schnaubelt was at the Haymarket until after ten o'clock, and was on the wagon with Spies, Parsons, and Fielden; that Spies did walk in company with somebody from the wagon westward on Randolph Street for the avowed purpose of finding Parsons, who had been seen before eight o'clock at the corner of Randolph and Halsted streets, and did return along Randolph Street to the wagon in company with the same person who started with him.

The statements of Owen and Heineman and of Spies and Schwab themselves, when analyzed and compared, show that Schwab was at the Haymarket that evening for at least half an hour, and that Spies was there at the same time. Other testimony shows that Schnaubelt was there at the same time.

Thompson is confirmed in many particulars. He says that "Schwab came rushing along Desplaines Street in a great hurry." Owen also says: "Schwab came up and almost run into the mayor before he saw him."

Thompson says that just after seeing Schwab he crossed to the east side of Desplaines Street, went north towards Lake, then returned southward, saw Spies get on the wagon, and heard him ask if Parsons was present; then, while he was

standing at the entrance to the alley, saw Spies, after his descent from the wagon, go with Schwab for a few moments into the alley, etc. Owen says that when Schwab saw the mayor at the corner of Desplaines and Randolph streets he "immediately upon that turned about and went north on Desplaines Street." It thus appears that Schwab was seen going in the direction of the alley, where Thompson claims to have seen the meeting between him and Spies, and at about the time when that meeting is claimed to have been witnessed. Schwab says himself that he "went across Randolph Street, and north of Randolph on Desplaines I met my brother-in-law, Rudolph Schnaubelt."

Cosgrove says: "I saw Mr. Schwab there before the meeting began. I saw him there just after the time Mr. Spies returned. . . . . The first time I saw him was about forty feet south of Randolph on Desplaines Street, on the west side of the street. The last time I saw him was at the wagon,—it was about half-past eight."

McKeough says: "I saw Schwab on the wagon in the early part of the evening, and a man named Schnaubelt. . . . . Spies started away then, and officer Meyers and I followed him as far as the corner. There was a man with him, who, I think, was Schwab. I saw Schwab there in the early part of the evening. I lost sight of him finally, somewheres in the vicinity of half-past eight o'clock. After that I did not see him at all during the entire evening. . . . . He got on the wagon, I think, before the meeting started, and tapped Mr. Spies on the shoulder and said something to him. I saw him at the side of the wagon, talking to Spies." Freeman, a reporter, also says that he thought he saw Schwab on the wagon.

The person who thus spoke to Spies on the wagon, and who was Schwab according to McKeough's evidence, is said by Spies to have been one Schroeder. Spies also says that the man who started away with him towards the corner of Desplaines and Randolph streets was Schnaubelt. As McKeough speaks of seeing Schnaubelt on the wagon, he must have known him, and he does not refer to Schnaubelt as being with Spies when the latter went off to the west.

The south end of the wagon was only a few feet from the mouth of the alley, and if Schwab and Spies did step into the alley and utter a few words, which Thompson claims to have heard, it could all have been done in a few seconds before they started towards Randolph Street.

The utterance of the words "pistols" and "police" at that time and under those circumstances was natural, as Schwab had just passed the Desplaines Street station, and he must have seen what Sahl, one of the witnesses for the defense, says that he saw, at about a quarter before eight o'clock, namely, "three patrol wagons manned with police, and about one hundred to one hundred and fifty men drawn up in the rear of the patrol wagons, on Waldo place." That this created such an excitement among those interested in the Haymarket meeting as would have given rise to the expressions which Thompson claims to have heard, is manifest from the language used by Spies and Parsons in their speeches.

The conversation between Spies and Schwab, as sworn to by Thompson, would indicate a knowledge of the place where bombs were to be had. Schwab belonged to the same North Side group, engaged in arming for May 1st, to which Seliger and Lingg belonged. Seliger, one of the bomb-makers, was a member of the central or general committee, which held its meetings every two weeks in the library-room in the rear of Schwab's office at the Arbeiter Zeitung building. Schwab says that he started from his house, No. 51 Florimond Street, to his office on Tuesday night at twenty minutes before eight. At that time Lingg and Seliger were preparing to leave 442 Sedgwick Street to take the bombs to Neff's Hall.

The remark, "Now, we will give it to them," would imply that if Spies and Schwab gave Schnaubelt a bomb, they obtained it from some one among the twenty-five men into whose midst they went at the corner of Halsted and Randolph streets. The most direct route to the Haymarket from No. 58 Clybourne Avenue is south on Larrabee Street to Chicago Avenue, west on Chicago Avenue to Halsted Street, and south on Halsted to Randolph Street. It is proven in this record that on Tuesday night a patrol wagon went from the corner of North Avenue and Larrabee Street — a point considerably north of 58 Clybourne Avenue — to the Haymarket in eight minutes by the route here indicated. From the precautions which the record shows to have been necessary in the handling of these bombs, they could not have been carried safely and comfortably on a street-car without attracting attention. If they had been brought in a wagon of any kind or by a person on foot from Neff's Hall to the Haymarket along the route traveled by the patrol wagon, one of the corners of Halsted and Randolph Streets would have been a

very natural place to look for them. There is evidence in the record tending to show that several of Lingg's assistants in the matter of making bombs were at the Haymarket meeting.

2. As to the proof tending to contradict Thompson. Spies and Schwab both swear that they not only did not talk together or walk together at the Haymarket meeting, but that they did not see each other on that evening.

Henry W. Spies also contradicts Thompson, but we regard his evidence as seriously weakened by his cross-examination. He testifies, on his direct examination, as follows: "While the speaking was going on I was standing right alongside of the wagon . . . . I stood there during the entire meeting. . . . . I saw Fielden getting off at the back end of the wagon. I told my brother (August Spies, the defendant) to get off, and reached my hand over to him to help him jump. He took my hand. . . . . Just at that time the explosion took place. . . . . As he jumped, somebody jumped behind him with a weapon right by his back, and I grabbed it, and in warding off the pistol from my brother, I was shot." On his cross-examination, he says: "On the 6th of May I was arrested at my house by officers Whalen and Lowenstein. I told them that when the bomb exploded, I was at Zepf's Hall, walked out, and was shot in the door. I told them that I was not at the Haymarket at all, from beginning to end. That was not true when I told it to them. I lied to them. . . . . I also said that I did not see my brother that evening until he called at the house, and asked me if I had a good physician. I now state that what I then said about that was not the truth."

Richter says that he was standing at about the middle of the mouth of the alley and saw Spies on the wagon, when he asked "Is Parsons here?" but did not see him go into the alley after he descended from the wagon. He says, however, that he did not notice on which side of the wagon Spies alighted, nor in what direction he went after leaving the wagon.

Lindinger says that he did not see Spies or Schwab enter the alley, but he also says that after Spies called for Parsons, he descended from the wagon on the north side, and "I didn't follow him only until he was down off the wagon."

So with Liebel; he says that he did not see Spies enter the alley. But he also says that he did not see in what direction or where Spies went after he left the wagon.

Sahl's testimony tends more strongly to contradict Thomp-

son than that of the other witnesses. He says that he knew Spies and Schwab, and had heard them speak at Greif's Hall and Zepf's Hall; that he saw Spies on the wagon, and heard him ask for Parsons; that Spies, after he came down from the wagon, passed witness in company with two or three other persons, and that Schwab was not one of them. Sahl was at the time in the middle of the street, in a southwesterly direction from the wagon, in the crowd of persons standing there.

Thompson's testimony is positive in its character, and he is unimpeached as a witness, while that of the defense upon this subject is for the most part negative in character.

The jury had a right to consider the evidence of Spies and Schwab in the light of the facts that they were both on trial for murder, and that their statements on the stand were inconsistent with and contradictory of previous declarations made by them: 1 Greenl. Ev, sec. 111.

The prosecution introduced a witness by the name of Harry L. Gilmer. If the testimony of this witness is true, there is no doubt but that the defendant Spies is guilty of the murder of Degan. He swears that Spies struck a match and lighted the fuse of a bomb in the hand of Rudolph Schnaubelt, and that Schnaubelt at once, as soon as Spies had applied the match, threw the bomb into the midst of the police.

Gilmer says that he came to the Haymarket meeting at about a quarter before ten o'clock; that he had been on the South Side, and was going to his home on the West Side, and stopped at the meeting on his way; that he went up from Randolph Street on the east side of Desplaines, while Fielden was speaking, and stood between the lamp-post on the southeast corner of the alley and Desplaines Street and the wagon, near the east end of the wagon; that he stepped back into the alley, on the north side thereof, and noticed some parties opposite him, on the south side of the alley, who were talking in German, and whose conversation he did not understand; that he heard some one on the edge of the sidewalk say, "Here come the police," and then there was a rush as if to see the police as they were coming up; that a man came from the wagon to the parties on the south side of the alley, and "lit a match and touched it off, something or other; the fuse commenced to fizzle, and he gave a couple of steps forward and tossed it over into the street; . . . . the man that lit the match came on this side of him, and the two or three of them stood

together, and he turned around with it in his hand," etc. The witness stated that he did not know the name of the man who threw the bomb, but knew him by sight, as he had seen him several times at meetings at different places in the city. When shown a photograph of Schnaubelt, he said: "I say that is the man that threw the bomb out of the alley." When asked who the man was that came from the wagon towards the group referred to and lighted the match, he pointed to the defendant Spies, and said: "That is the man right there." The defense have proven that a match was lighted in the alley at this time, but claim that it was struck by a laborer, in order to light his pipe.

The defense introduced nine witnesses, living in Chicago, for the purpose of impeaching Gilmer. The prosecution introduced eight witnesses from Iowa, where Gilmer lived from 1870 to 1879, and ten witnesses from Chicago, where he lived from 1879 to 1886, to sustain his reputation for truth and veracity. Before a witness can say that he will not believe a man under oath, he must first swear that he knows that man's reputation for truth and veracity among his neighbors, and that such reputation is bad. The unwillingness to believe under oath must follow from and be based upon two facts: 1. The fact that the witness knows the reputation for truth and veracity among the man's neighbors; 2. The fact that such reputation is bad. As the reputation must be bad before it can be known to be bad, the most material fact to be proved is that such reputation is bad. What a man's reputation is, is a fact to be proved just as any other fact. Where, as here, eighteen witnesses of standing and credibility swear that a man's reputation is good, while nine of equal standing and credibility swear that it is bad, the jury must determine for themselves whether they will believe the eighteen men or the nine men.

Other testimony introduced to discredit Gilmer was intended to establish, — 1. That the bomb was not thrown from the point from which Gilmer said it was thrown; 2. That Spies was just getting off the wagon when the explosion occurred, and therefore could not have been in the alley lighting a match.

A witness by the name of Bernett swore that he saw the bomb thrown, and that the man who threw it stood right in front of him and threw the bomb towards the northwest. Desplaines Street, between the sidewalks, is forty-eight feet

six inches wide. The bomb fell "on the west side of Desplaines Street slightly north from the south line of the alley" extended. The testimony of Bernett does not cast much light upon the subject, either as to the person who threw the bomb, or as to the point from which it was thrown. When shown the photograph of Schnaubelt and asked if that was the man who threw the bomb, he says: "I guess not; I never could recognize anybody." He says that the man who threw the bomb had his back turned towards him, and that he could not describe him and would not know him if he saw him. As to the place where he stood when the bomb was thrown, he placed it at one time, ten or fifteen feet south of the alley, at another, thirty-eight feet south of the alley, at another, forty-five feet south of the alley.

The testimony of the witnesses differs very greatly as to the point, with reference to the alley, from which the bomb ascended into the air before it fell. One witness says it came from a point north of the alley, another, that it came from a point five or six feet south of the corner of the alley, others fix the point at various distances south of the alley, varying from five to forty-five feet. Witnesses for the defense, identified mostly with the International organization, and from whose midst the shots fired at the police must have come, place the point from which the bomb was thrown at the greatest distances south of the point where Gilmer fixes it.

Heineman, the reporter, a witness whose testimony is favorably quoted by both sides, says that he was forty-five feet south of the alley, on the east sidewalk of Desplaines Street, when the bomb exploded, and that he saw the bomb, or the burning fuse rise out of the crowd from "very nearly the southeast corner of the alley" and "fall among the police." This is just about the place from which Gilmer says that it ascended.

When the police halted and the captain gave the order to disperse, they were very near the south end of the wagon. The main body was on a line with the mouth of the alley, which was eleven feet wide. Bonfield says "the front rank of the first division was near up to the north line of the alley." All the police faced towards the north and were standing in regular fixed lines. Several of the officers describe the course of the bomb through the air, as seen by them from their positions in the ranks. It could not have been seen by them in the manner indicated in their testimony

if it had started from a point as far south as that sworn to by Bernett and some of the other witnesses for the defense.

The defense introduced a number of witnesses more or less identified with the defendants in their conspiracy against the police, and who stood around the wagon during the evening, for the purpose of showing that Spies did not go into the alley just before the explosion. The testimony is negative in its character. It may have been true that Spies did go into the mouth of the alley as Gilmer says, and yet it may be true that most of these witnesses, whose attention was naturally directed towards the approaching columns of the police, may not have seen him enter the alley. The defendant Spies swears that when the order to disperse was given he was still on the wagon, and that when he dismounted the bomb exploded just as he touched the sidewalk. The evidence of other witnesses for the defense tends to confirm this statement. He says that after the explosion he was carried northward by the pushing crowd, and went into Zepf's Hall, and that he did not go into the alley nor in the direction of the alley. But Bonfield swears that, after his arrest, Spies claimed to have gone, after the explosion, eastward through Crane's Alley, and then southward therefrom to Randolph Street. Henry Spies inquired for his brother at Zepf's Hall just after the explosion, but did not find him there.

To further contradict Gilmer, a witness was examined for the purpose of showing that Schnaubelt left the Haymarket before the bomb was exploded. This witness was August Krueger, the orderly sergeant and corresponding secretary of the second company of the Lehr und Wehr Verein. He was present at the Monday night meeting of the armed sections, at which Schnaubelt was also present.

Krueger states that he saw the notice of the Haymarket meeting in the Arbeiter Zeitung, and went there about nine o'clock, and remained until ten o'clock; that about ten o'clock he was standing on the west side of Desplaines Street, about thirty or forty feet north of Randolph Street, when Schnaubelt came towards him from the northeast; that he had seen Schnaubelt before, but did not know his name; that Schnaubelt proposed to him to go home; that he walked south to Randolph Street with Schnaubelt, then eastward to Clinton Street, when Schnaubelt proceeded on eastward on Randolph Street, while he went north on Clinton Street, thence by way of Milwaukee Avenue to Engel's house.

If this were all true, Schnaubelt may have returned and entered Crane's Alley through its opening into Randolph Street. Krueger stated, after he was arrested on May 6th, that he was not at the Haymarket at all on the evening of May 4th; and upon his cross-examination in this case, he admits that he so stated.

There is a mass of testimony in the record in reference to the statements made by Thompson and Gilmer. Some of this testimony sustains those statements, and some of it discredits them. Any further review of it than that which has already been made will be impossible in this opinion. It is sufficient to say that it is very conflicting. It was the province of the jury to pass upon it. They had the right to consider it in connection with all the other facts and circumstances in the case.

It is not necessary for us to pass any opinion upon it, as we think there is evidence enough in the record to sustain the finding of the jury independently of the testimony given by Thompson and Gilmer.

FIELDEN.

On Monday evening, the defendant Fielden was making a speech to some wagon-makers on one of the upper floors of the building No. 54 West Lake Street, while the armed sections were concocting their conspiracy in the basement of that building. The proof does not show, however, that he was present at the meeting in the basement, or took part in the original formation of the Monday night conspiracy.

A conspiracy may be described in general terms as a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means: 3 Greenl. Ev., sec. 89; *Heaps* v. *Dunham*, 95 Ill. 583. It is not necessary, however, that the accused should have been an orignal contriver of the mischief, "for he may become a partaker in it by joining the others while it is being executed": 2 Bishop on Criminal Law, 190. "If he concur, no proof of agreement to concur is necessary. . . . . As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is complete. This joint assent of minds, like all other parts of a criminal case, may be established as an inference of the jury from other facts proved; in other words, by circumstantial evidence": 2 Bishop on Criminal Law, 190.

Are there such facts and circumstances proven in this case as would warrant a jury in finding that the defendant Fielden became a partaker in the conspiracy planned on Monday night by joining those who were engaged in its execution on Tuesday night?

He says that he had an engagement to make a speech Tuesday night on West Twelfth Street, but that he saw in an English evening paper a call to the members of the American group to meet at No. 107 Fifth Avenue on important business; that, as he was the treasurer of that group and had its funds in his hands, he canceled his engagement and went to the meeting so called, arriving at ten minutes before eight. It was held in the office of the Arbeiter Zeitung newspaper, and has already been referred to. Between eight and nine o'clock he left the Arbeiter Zeitung building and went over, in company with Parsons and other members of the International Rifles, to the Haymarket. After the crowd there had been addressed by Spies and Parsons, the defendant Fielden made a speech from the wagon, some of which was as follows: —

"There are premonitions of danger. All knew. The press say the anarchists will sneak away. We are not going to. If we continue to be robbed, it will not be long before we will be murdered. There is no security for the working classes under the present social system. A few individuals control the means of living, and holding the workingmen in a vise. Everybody does not know. Those who know it are tired of it, and know the others will get tired of it, too. They are determined to end it, and will end it, and there is no power in the land that will prevent them. Congressman Foran said: 'The laborer can get nothing from legislation.' He also said that the laborers can get some relief from their present condition when the rich man knew it was unsafe for him to live in a community where there were dissatisfied workingmen, for they would solve the labor problem. I don't know whether you are Democrats or Republicans, but whichever you are, you worship at the shrine of rebels. John Brown, Jefferson, Washington, Patrick Henry, and Hopkins said to the people: 'The law is your enemy. We are rebels against it. The law is only framed for those that are your enslavers.' [A voice: "That is true."] Men in their blind rage attacked McCormick's factory, and were shot down by the law, in cold blood, in the city of Chicago, in the protection of property. Those men were going to do some damage to a certain person's in-

terest, who was a large property-owner, therefore the law came to his defense; and when McCormick undertook to do some injury to the interest of those who had no property, the law also came to his defense, and not to the workingman's defense, when he, Mr. McCormick, attacked him and his living. [Cries of "No."] There is the difference. The law makes no distinctions. A million men own all the property in this country. The law has no use for the other fifty-four million. [A voice: "Right enough."] You have nothing more to do with the law except to lay hands on it, and throttle it until it makes its last kick. It turns your brothers out on the wayside, and has degraded them until they have lost the last vestige of humanity, and they are mere things and animals. Keep your eye upon it. Throttle it. Kill it. Stab it. Do everything you can to wound it, — to impede its progress. Remember, before trusting them to do anything for yourself, prepare to do it for yourself. Don't turn over your business to anybody else. No man deserves anything unless he is man enough to make an effort to lift himself from oppression. Is it not a fact that we have no choice as to our existence, for we can't dictate what our labor is worth? He that has to obey the will of any is a slave. Can we do anything except by the strong arm of resistance? Socialists are not going to declare war; but I tell you war has been declared upon us, and I ask you to get hold of anything that will help to resist the onslaught of the enemy and the usurper. The skirmish lines have met. People have been shot. Men, women, and children have not been spared by the capitalists and minions of private capital. It had no mercy — so ought you. You are called upon to defend yourselves, your lives, your future. What matters it whether you kill yourselves with work to get a little relief, or die on the battle-field, resisting the enemy? What is the difference? Any animal, however loathsome, will resist when stepped upon. Are men less than snails or worms? I have some resistance in me. I know that you have, too. You have been robbed, and you will be starved into a worse condition."

At this point the policemen appeared and ordered the meeting to disperse, as has already been stated. Witnesses for the state swear that when the police were approaching the alley, either Fielden, or some one with him on or near the wagon, used the following language: "Here come the bloodhounds; do your duty, men, and I'll do mine." Witnesses for the defense swear that no such words were spoken. Whether one

set of witnesses or the other told the truth upon this subject, was a matter for the jury to decide.

There is evidence of a very distinct and positive character that Fielden shot at the police:—

Lieutenant Martin Quinn says: "There was a shot fired from the wagon by the man that was speaking at that time. . . . . It is Mr. Fielden here. . . . . He made the remark, 'We are peaceable,' just as he was going down off of the wagon onto the sidewalk, ... and just as he was going down he fired right where the inspector was, and Captain Ward and Lieutenant Steele," etc.

Officer Krueger says: "He [Fielden] stood at the south end of the wagon; . . . . he stepped down from the wagon, and passed right to my right, behind the wagon, and in about a moment the bomb fell behind me. Then I saw a pistol in his hand, and it exploded twice. I am certain of two shots being fired by that gentleman [Fielden]. I stood within about six or eight feet of the wagon, on the street side of it. He [Fielden] passed right past me; I could almost have touched him with my hand, and he went right behind the wagon, and stepped up on the sidewalk when the bomb exploded. Then I saw him have a pistol in his hand, and he fired twice, to my recollection; . . . . he took cover behind the wagon; he covered himself with the wagon between the police and him; I then returned his fire, and at the same instant I received a bullet in my knee-cap; he fired directly at the column of the police, and he fired two shots from there; he stooped down behind the wagon."

L. C. Baumann, a policeman of Lieutenant Steele's company, says: "I was standing north of that alley there, I should judge three or four feet from the wagon. . . . . I saw Mr. Fielden, that he was standing on the hind wheel, behind the hind wheel, of the wagon, and had a revolver in his hand, and fired off a shot; he was standing on the sidewalk, right behind the hind wheel; he shot from east to west; that was after the explosion of the bomb, I should say about half a minute."

Officer Hanley says: "At the time the bomb exploded, I was about four or five feet from the wagon; I was facing north; I noticed the man that was the last speaker; immediately after the bomb exploded, I turned my face from [to] where the explosion was, and I looked for the wagon again, and I noticed that man right over there [referring to defendant Fielden] by the wheel of the wagon, with a revolver, right behind, firing.

I saw one shot go, then I thought it was time to draw my revolver, and just as I got my revolver out, they rushed for the alley, that was a little south of the wagon. Q. Who rushed into the alley? A. Well, him [Fielden], and about, I really should judge, about twenty more; they kept firing about fifteen or twenty shots after they started to run in the alley."

Officer Spierling says: "I was facing north when the bomb exploded; I was about ten or twelve feet from the wagon at that time. I saw Mr. Fielden get off of the wagon and fire one shot; he was standing behind the wagon, on the sidewalk."

John Wessler, a policeman in Lieutenant Bowler's company, testified: "The wagon stood next to the curb, lengthwise, and at the middle of the south end of the wagon, Mr. Fielden stood there, and I noticed, before I got there, a man who would not stand up, and he would shoot into the police and get down behind the wheel, ... and I went up and saw that Mr. Fielden was there, and he got up a second time and shot into the police."

Fielden swears that he not only fired no shots on Tuesday evening, but that he had no revolver, and never carried one in his life. It was for the jury to determine whether he told the truth or not. They had a right to consider that he was on trial for murder, and that for more than a year prior to the Haymarket meeting he had not only been urging others to arm themselves, but himself belonged to the armed section of the American group, otherwise known as the International Rifles.

Besides Fielden, six witnesses were produced by the defense, who swore that they did not see any shots fired by Fielden. If there was a bias against the defendant Fielden on the part of the policemen testifying for the state, there was just as much of a bias in his favor on the part of those testifying for the defense. Here is a conflict of testimony. Six men swear that they saw pistol-shots fired by the defendant Fielden; six other men swear that they did not see such shots fired. The jury saw the witnesses and heard them testify, and marked their manner and bearing on the stand. It was their special province to determine whether the witnesses for the accused or for the people told the truth.

It is true that Degan was killed by the bomb that was thrown, and not by the shots that were fired. But the attack at the Haymarket was a joint attack made by a number of persons, with two different kinds of weapons, in pursuance of a pre-

viously arranged conspiracy. When Fielden lent himself to the execution of that conspiracy by participating in the joint attack, he was just as guilty of the murder of Degan by reason of firing his pistol as though he had thrown the bomb. If the man who threw the bomb, and the twenty men whom officer Hanley saw running into the alley, had stood up together, and the one had thrown his bomb and the others had fired their shots all at the same time into the ranks of the police, and one of the policemen had at once fallen dead, would not each of the twenty men have been as responsible as the bomb-thrower for the death of the man killed, whether such death was caused by the bomb or by the shots? All had the murderous intent. All were using deadly weapons in pursuance of a common design to destroy life. The conduct of Fielden at the Haymarket, considered in connection with his acts prior thereto, and with all the other facts as herein set forth, certainly warranted the jury in finding that he was one of the conspirators.

PARSONS.

What are the facts in regard to the connection of the defendant Parsons with the Haymarket meeting?

The call to the American group to meet at half-past seven o'clock at the Arbeiter Zeitung office on Tuesday evening was published by the defendant Parsons. The notice, which has already been referred to, was inserted by him in the Evening News, and the original manuscript from which it was printed was in his handwriting. He was seen by several witnesses at the Haymarket on the corner of Randolph and Halsted streets before eight o'clock, and before he appeared at the gathering of the group he had called together at 107 Fifth Avenue. From the latter place he went, in company with Fielden, Snyder, and others, to the speakers' wagon on Desplaines Street, and made a speech to the crowd there gathered. The witness Allen, who heard his speech, says:—

"About the only thing that I could quote exact was that at one time he said: 'What good are these strikes going to do? Do you think that anything will be accomplished by them? Do you think the workingmen are going to gain their point? No, no; they will not. The result of them will be that you will have to go back to work for less money than you are getting.' That is his language, in effect. . . . . At one time he mentioned the name of Jay Gould. There were cries from the crowd, 'Hang Jay Gould—throw him into the lake,' and so

on. He said: 'No, no; that would not do any good. If you would hang Jay Gould now, there would be another, and perhaps a hundred, up to-morrow. It don't do any good to hang one man. You have to kill them all, or get rid of them all.' Then he went on to say that it was not the individual always, but the system. That the government should be destroyed. It was the wrong government, and these people who supported it had to be destroyed *en masse*. The temper of the crowd was extremely turbulent, especially after that speech he made about the workingmen not gaining anything by the strike. . . . . The crowd seemed to me to be thoroughly in sympathy with the speaker, and applauded almost every utterance."

Tuttle says: "The crowd that was enthusiastic was near the wagon or around it, and some were on the north side of the wagon. The same parties who had spoken when he referred to Gould,—I think the same,—one of them any way, because I had my eye on him for two or three minutes,—two minutes, I should say. I think I could describe the man, and would know if I saw him. He stuck up his hand like that [illustrating], with a revolver in it, and said: 'We will shoot the devils,' or some such expression. And I saw two others sticking up their hands near to him, who made similar expressions, and had what I took to be, at that time, revolvers. But this one man I speak of, I took particular notice of him, and remember his appearance, and saw his revolver very plainly in his right hand,—and he grasped it about the center of the weapon, and stuck it up in front of the speaker."

Cosgrove says that Parsons talked of the police and capitalists, and militia, and Pinkertons. He said he was down in the Hocking Valley region, and said they were only getting twenty-four cents a day, and that was less than Chinamen, and he said: "My friends, you will be worse than Chinamen, if you don't arm yourselves," and he said they would be held responsible for the blood that would flow in the near future.

McKeough testifies: "Parsons, among other things, said: 'I am a tenant, and I pay rent to a landlord. . . . . The landlord pays taxes, the taxes pay the sheriff, the police, the Pinkerton knights, and the militia that are on duty out at the barracks, who are ready to shoot you down when you are looking for your rights. I am a socialist from the top of my head to the soles of my feet, and I will express my sentiments, if I die before morning.' He said that very strongly, and made a great commotion. That seemed to kind of catch the crowd

in the neighborhood of the wagon, and they let out a great cheer. . . . . I went to the outer edge of the crowd. . . . . The next remark I heard Mr. Parsons say, taking off his hat in one hand, said he: 'To arms, to arms, to arms,' three times distinctly."

English says: "Spies, I think, spoke fifteen or twenty minutes. . . . . Well, now, here is an abstract of Parsons, and I can't give the exact language when he first started off. It was about the workingmen, that the remedy for their wrongs was in socialism. He said, without them they would soon become Chinamen. He said: 'It is time to raise a note of warning. There is nothing in the eight-hour movement to excite the capitalist. Don't you know that the military are under arms, and a Gatling gun is ready to mow you down? Was this Germany, or Russia, or Spain?' [A voice, "It looks like it."] 'Whenever you make a demand for eight hours' pay, an increase of pay, the militia, and the deputy sheriffs, and the Pinkerton men are called out, and you are shot, and clubbed, and murdered in the streets. I am not here for the purpose of inciting anybody, but to speak out, to tell the facts as they exist, even though it shall cost me my life before morning.' Then he went on to tell about the Cincinnati demonstration, and about the rifle-guard being needed. There is another part of it here. 'It behooves you, as you love your wife and children, if you don't want to see them perish with hunger, killed, or cut down like dogs on the street, Americans, in the interest of your liberty and your independence, to arm,—arm yourselves.'"

Simonson, a witness for the defense, says of the speech made by Parsons: "I remember in his speech he said: 'To arms, to arms, to arms,' but in what connection I cannot remember."

There is no dispute about the fact that Spies spoke first, Parsons next, and Fielden last. It is claimed by the defense, that, just before Fielden closed his speech, Parsons left the speakers' wagon, or a wagon standing just north of it, on account of an appearance of rain, and went to Zepf's Hall, and that he was in the saloon at Zepf's Hall when the bomb exploded. Allen, one of the newspaper reporters, says: "When the bomb was thrown I was in the saloon of Zepf's Hall, standing about the middle of the room at the time. I did not see any of the defendants there. . . . . I am almost certain Parsons was not at Zepf's Hall. . . . . There was a constant passing to and fro from the furniture-workers' meeting up-

stairs to the meeting over at the Haymarket. I was with Mr. Malkoff at Zepf's Hall." Parsons says that "in a moment or two" after the explosion, two or three men rushed breathlessly in at the door of the saloon, and that he "remained there possibly twenty minutes or so." Knox, another newspaper reporter, swears that he had a conversation with Spies on the night of May 5th, and Spies then said that when the bomb exploded he ran to Zepf's Hall, and there found a certain party "waiting for" Parsons.

The statement of Parsons, that he was in the saloon at Zepf's Hall when the bomb exploded, is sustained by the testimony of Ingram; of Malkoff, a Russian, who, on May 4, 1886, was a reporter for the Arbeiter Zeitung and a correspondent of a paper in Moscow, Russia, and had roomed with Rau and lived with Schwab; of Brown, a member of the American group, who had attended the meeting at 107 Fifth Avenue on Tuesday night, and had been arrested by reason of his connection with the Haymarket meeting; and of Wandray, who had belonged to the Northwest Side group for three years before December, 1885.

Two circumstances are to be noted: 1. It can hardly be said that Parsons was absent from the Haymarket meeting when he went into Zepf's Hall. It has already been stated that the latter place was only a few steps north of the speakers' wagon and in sight from it. Parsons himself says that before he left the wagon he "saw the lights through the windows of the hall." From the window of the saloon he was watching the proceedings around the wagon, when the explosion occurred. He says: "All at once, looking directly at the meeting, I saw an illumination." 2. He did not start to Zepf's Hall until five or ten minutes before the police came up to the wagon. When he left the wagon for the saloon, Fielden had just uttered the words about stabbing and throttling the law, which had so excited the crowd as to induce McKeough to go to the Desplaines Street station and report to the police inspector what had been said.

We do not think that the defendant Parsons can escape his share of the responsibility for the explosion at the Haymarket because he stepped into a neighboring saloon and looked at the explosion through the window. While he was speaking, men stood around him with arms in their hands. Many of these men were members of the armed sections of the International groups. Among them were men who belonged to

the International Rifles, an armed organization in which he himself was an officer, and with which he had been drilling in preparation for the events then transpiring. To the men then listening to him, he had addressed the incendiary appeals that had been appearing in the Alarm for two years. He had said to them: "One dynamite bomb, properly placed, will destroy a regiment of soldiers, — a weapon easily made, and carried with perfect safety in the pockets of one's clothing." He had said to them, on Saturday, April 24, 1886, just ten days before May 4, 1886, in the last issue of the Alarm that had appeared before May 4th: "Workingmen, to arms! War to the palace, peace to the cottage, and death to luxurious idleness. The wage-system is the only cause of the world's misery. One pound of dynamite is better than a bushel of bullets. Make your demand for eight hours with weapons in your hands to meet the capitalistic blood-hounds, police, and militia in proper manner." And at the close of another article in the same issue he had also said: "The social war has come, and whoever is not with us is against us." To many of these same men there gathered around the wagon from which he was speaking, after denouncing the police and militia as ready to shoot them down, he took off his hat and cried out: "To arms! To arms! To arms!" Within less than an hour after the delivery of this appeal, and on the spot where it was made, persons in the crowd to which it was addressed attacked the police with bomb and revolver, and Degan was killed. What is the law applicable to the state of facts here recited?

"If one purposely excites another to commit an offense, as, if he harangues people, inflaming them to a riot, and the offense is accordingly committed, he is guilty though he personally takes no part in it": 1 Bishop's Crim. Law, 640.

In *Regina* v. *Sharpe*, 3 Cox C. C. 288, Chief Justice Wilde, in charging the jury, said:—

"If persons are assembled together, to the number of three or more, and speeches are made to those persons, to excite and inflame them, with a view to incite them to acts of violence, and if that same meeting is so connected in point of circumstances with a subsequent riot that you cannot reasonably sever the latter from the incitement that was used, it appears to me that those who incited are guilty of the riot, although they are not actually present when it occurs. I think it is not the hand that strikes the blow, or that throws

the stone [bomb] that is alone guilty under such circumstances; but that he who inflames people's minds, and induces them by violent means to accomplish an illegal object, is himself a rioter, though he take no part in the riot. It will be a question for the jury whether the riot that took place was so connected with the inflammatory language used by the defendant that they cannot reasonably be separated by time or other circumstances."

The jury were warranted in believing, from the evidence, that the defendant Parsons was associated with the man who threw the bomb and the men who fired the shots at the Haymarket, in a conspiracy to bring about a social revolution in Chicago, by force, on or about May 1, 1886; or, in other words, to destroy the police and militia on or about that date with bombs and revolvers or rifles. It is well settled that, when the fact of a conspiracy is once established, any act of one of the conspirators in the prosecution of the enterprise is considered the act of all: *Nudd* v. *Burrows*, 91 U. S. 426; 1 Wharton's Crim. Law, 6th ed., sec. 702; 3 Greenl. Ev., sec. 94.

It makes no difference that Parsons may not have been present in the basement of Greif's Hall when the Monday night conspiracy was planned. He belonged to the armed sections, whose representatives entered into that conspiracy, and was one of the absent members, who were to be informed of its provisions. One of those provisions was the holding of a meeting at the Haymarket. When he went to that meeting, in obedience to a summons from Rau, and there made an incendiary speech, he joined the others in their execution of the conspiracy, and thereby became a party to it. "Individuals who, though not specifically parties to the killing, are present and consenting to the assemblage by whom it is perpetrated, are principals when the killing is in pursuance of the common design": Wharton on Homicide, 2d ed., sec. 201; Wharton's American Law of Homicide, 345, 346 et seq.; *Regina* v. *Jackson*, 7 Cox C. C. 357; *Commonwealth* v. *Daley*, 4 Pa. L. J. 150.

The plan adopted on Monday night was merely a specific mode of carrying out the more general conspiracy to which Parsons and those present on Monday night were all parties. The adoption of the Monday night plot was the act of those who were co-conspirators with Parsons. It was therefore his act. He had advised the use of bombs and arms against the police on or about May 1st. The men who met Monday night merely indicated more specifically the time when and places

where and mode in which such bombs and arms should be used so as to be most effective. "A man may be guilty of a wrong which he did not specifically intend, if it came naturally or even accidentally through some other specific or a general evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of one proceeding or growing out of the common plan terminates in a criminal result, though not the particular result meant, all are liable": 1 Bishop's Crim. Law, 636, and cases cited.

"There might be no special malice against the party slain, nor deliberate intention to hurt him; but if the act was committed in the prosecution of the original purpose, which was unlawful, the whole party will be involved in the guilt of him who gave the blow": Fost., p. 351, sec. 6. "Where there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged": *State* v. *McCahill*, 30 N. W. Rep. 553.

He who enters into a combination or conspiracy to do such an unlawful act as will probably result in the unlawful taking of human life, must be presumed to have understood the consequences which might reasonably be expected to flow from carrying it into effect, and also to have assented to the doing of whatever would reasonably or probably be necessary to accomplish the objects of the conspiracy, even to the taking of life: 1 Wharton on Criminal Law, 9th ed., sec. 225 a; *Brennan* v. *People*, 15 Ill. 511; *Hanna* v. *People*, 86 Id. 243; *Lamb* v. *People*, 96 Id. 74.

NEEBE.

The defendant Neebe, as has already been stated, was a member of the North Side group, which had resolved "not to meet the enemy unarmed on May 1, 1886." He was one of the stockholders of the Arbeiter Zeitung, and, next to Spies and Schwab, the most active man in its management. He was looked for and found at the Arbeiter Zeitung office in consultation with Spies and Schwab during the week prior to May 4th. The testimony of Gruenhut shows that Neebe was active in organizing and preparing for the movements then going on. He was found in possession of the Arbeiter Zeitung building after the arrest of Spies and Schwab, and announced himself as the person who had charge of the office. He stated

to the officers that a package of dynamite, which they found in a closet on one of the floors of the building, was something for "cleaning type." There were found at his house, on May 7th, a red flag, a sword, a breech-loading gun, and a thirty-eight-calibre Colt's revolver, five chambers of which had been fired; one chamber was loaded with a cartridge, and one had a shell in it. He is shown to have presided at meetings where the use of arms and dynamite against the police was advocated. On Monday night, May 3, 1886, he was seen distributing the Revenge Circulars. He took a package of them into a saloon at the corner of Franklin and Division streets on that night, between nine and ten o'clock, and placed some on the counter and some on the tables while seven or eight persons were present. He stated there that the circulars had just then been printed. He exhibited anger towards the police, and said, in reference to the riot of that afternoon: "It is a shame that the police act that way; but maybe the time comes that it goes the other way, — that they get the chance, too."

When a man, as prominently connected as Neebe was with the International organization and its organ and leaders, was proven to have been engaged late on the night before the Haymarket murder in distributing an inflammatory circular calling upon ignorant workingmen to arm themselves and avenge the act of the police in quelling a riotous disturbance, we cannot say that the jury were not justified in holding him responsible, along with his confederates, for the murder on Tuesday night of one of the very policemen whose death he was urging and advocating on Monday night. We do not think that the trial court erred in refusing the instructions asked on his behalf.

Various errors are assigned upon the record. These errors relate to the evidence introduced, the instructions given, and the impaneling of the jury.

It is claimed that the trial court admitted improper testimony. The newspaper articles and the speeches, already referred to, are complained of as having been improperly received in evidence.

We think that there was no error in admitting them, for the following reasons:—

1. The International Association in Chicago, as above described, was an illegal organization, engaged in making bombs and drilling with arms for the unlawful purpose of attacking the police if the latter should assume to do their

duty in the protection of the public peace. Its members were conspirators, and by their act of conspiring together they "jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design": 3 Greenl. Ev., sec. 93. The papers which published the articles in question were the organs of this conspiracy. The men who made the speeches in question were its spokesmen and mouth-pieces. Hence the utterances of these papers and speakers were competent evidence as showing the purposes and intentions of the conspiracy which they represented.

2. Spies, Schwab, Parsons, and Engel were responsible for the articles written and published by them, as above shown. Spies, Schwab, Fielden, Parsons, and Engel were responsible for the speeches made by them respectively. As against these defendants, the articles and speeches in question were properly introduced in evidence, not because they gave general advice to commit murder, but because they advised and encouraged a particular class in Chicago, to wit, the members of the International groups, and such other workingmen as could be persuaded to join them, "to arm themselves with guns, revolvers, and dynamite," and kill another particular class in Chicago, to wit, the police, at a particular time, to wit, about May 1, 1886. There is evidence in the record tending to show that the death of Degan occurred during the prosecution of a conspiracy planned by members of the International groups, who read these articles and heard these speeches. How far the formation and execution of this conspiracy may have been aided and encouraged by the printed and spoken utterances of the particular defendants here named was a proper matter for the jury to consider, in the light of all the other circumstances developed by the testimony in the case.

3. The evidence objected to was properly introduced against all the defendants. Where the conspiracy is once established, every act and declaration of each member in furtherance of the common design is, in contemplation of law, the act and declaration of all the members, and is therefore original evidence against each of them. "It makes no difference at what time any one entered into the conspiracy": 1 Greenl. Ev., sec. 111. All the defendants in this case are proven to have belonged to the illegal organization above specified. Hence they were all co-conspirators. The speeches and newspaper articles here under consideration were in furtherance of the common de-

sign. Being the acts and declarations of some of the conspirators, they were the acts and declarations of all of them.

It is not necessary to hold that the conviction of the defendants in this case is to stand merely because they made speeches and published articles advising the murder of the police. Such conviction is sustained because there is evidence in the record from which the jury were warranted in believing that the defendants advised, encouraged, aided, and abetted the perpetration of the crime committed at the Haymarket. When they combined or conspired together with a view of bringing about that crime, and became united in a common plan for its commission, then the acts and declarations of any one of them which had the effect of advising, encouraging, aiding, and abetting its perpetration, were the acts and declarations of all.

We do not agree with the position of counsel, that the general conspiracy hereinbefore described, and the plot of Monday night, May 3, 1886, were two separate conspiracies. The latter was merely the outgrowth and culmination of the former. The latter merely designated the particular mode in which the objects of the former were to be effected. It was competent to show the acts and declarations of the parties to the general conspiracy which preceded and led up to the formation of the special plot of May 3d, with a view of understanding the latter. The defendants were engaged in a series of efforts to increase the International groups by accessions from the workingmen, and to educate and discipline those groups in the making of bombs and in the use of fire-arms so as to prepare them for a conflict with the police when the eight-hour excitement should reach its height. Among these efforts were the speeches made and the publications issued as hereinbefore stated. The Monday night conspiracy was the product of these efforts, and could only be understood by showing their nature and character. These views are sustained by the following authorities: *Campbell* v. *Commonwealth*, 84 Pa. St. 187; *State* v. *McCahill*, 30 N. W. Rep. 553; *Card* v. *State*, 9 N. E. Rep. 591; *Rex* v. *Hammond*, 2 Esp. 718; *People* v. *Mather*, 4 Wend. 261; 21 Am. Dec. 122; 2 Bishop's Crim. Pr., sec. 277; *United States* v. *Cole*, 5 McLean, 601; *Queen* v. *Most*, L. R. 7 Q. B. D. 244.

The admission in evidence of Johann Most's book on the Science of Revolutionary Warfare is complained of as error. The work, which is called a book, is really nothing more than

a treatise in pamphlet form upon the most improved methods of making bombs and preparing dynamite and other explosives. It is thus characterized by the counsel for plaintiffs in error in their brief: "Here was a voluminous, incendiary, outrageous publication going into the detail of the manufacture of explosives and arms, and the manner of preparing them, filled with vile suggestions as to how to apply the results of modern science to the work of destruction of the capitalistic system, abounding in advice to persons who, as members of the so-called revolutionary forces, might propose to engage in the use of these weapons and explosives."

The circulation of this treatise was an act of the illegal organization to which all the defendants belonged, and was one of the methods by which that organization instructed and advised its members to get ready for the murder of the police during the eight-hour excitement. Its distribution among the members of the International groups at their picnics and meetings, through the agents of the International Association, is proven beyond controversy. The newspaper organs commended it and quoted from it and advertised it without charge. Lingg and Fischer read it, and acted upon the suggestions contained in it. When the leaders of the organization thus made use of this treatise, they adopted it as a manual of tactics, and it became a book of their written advice and instructions to their followers. It was competent testimony as showing the purposes and objects which they had in view, and the methods by which they proposed to accomplish those objects. When the newspaper organs commended its study to their readers, they made its suggestions a part of their own advice to those readers. The efforts of the defendants who controlled these organs to put this pamphlet into the hands of the members of the International groups were acts and declarations in furtherance of the conspiracy, and were binding upon the other defendants.

It is also assigned as error that the trial court admitted in evidence a letter written to the defendant Spies in 1884 by Johann Most, the author of the treatise above referred to. The letter is set out in the statement which prefaces this opinion.

The defendant Spies took the stand as a witness for the defense. Upon his cross-examination, the prosecution produced the letter in question, examined him in reference to it, and then offered it in evidence, and it was admitted.

The main objection is, that after the arrest of Spies certain

effects of his, including this letter, were seized by the police in the Arbeiter Zeitung office, without a search-warrant or other legal process; that such seizure was in violation of the United States and Illinois constitutions, and that the admission of the letter "was," in the language of counsel for plaintiffs in error, "improper, as being in effect a compelling of the plaintiffs in error to give testimony against themselves, contrary to the provision of the fifth amendment of the federal constitution and to the provision of article 2 of our constitution of 1870." In other words, the introduction of the letter is objected to in this court as having been in contravention of the principles laid down by the supreme court of the United States in *Boyd* v. *United States*, 116 U. S. 616. In that case, an act of Congress authorizing the federal courts to require parties charged with violations of the revenue laws to produce their books, invoices, and papers for inspection and for use in evidence against themselves, was declared to be unconstitutional. In the case at bar, the defendants were not required to produce the letter; the state had the letter and produced it. We will not attempt, however, to draw any distinction between this case and the Boyd case. We do not think that the record is in such shape as to permit counsel to make the point urged by them before this court.

In the first place, it is not clear from the testimony that the letter from Most was seized by the police in the manner suggested. Early in the trial, two police-officers, testifying for the prosecution, stated that on May 5, 1886, they took possession of a number of articles found in the office of the Arbeiter Zeitung newspaper, among which were certain letters lying on the desk occupied by Spies, and certain other letters in the drawer of the desk. But it nowhere appears in the record, so far as we can find, that this particular letter from Most to Spies, introduced near the close of the trial, was among the letters so taken from the top of Spies's desk, or among those so taken from the drawer of it. For aught that appears to the contrary, this letter may not have come to the hands of the state through the alleged illegal seizure complained of, but may have been obtained in some other proper and legitimate manner. We cannot infer that because certain letters were seized by the police, the Most letter must have been one of them.

On the trial below, counsel for the defense took the position that the letter was not found in the possession of Spies. We

find the following statement in the record of what occurred when the trial judge passed upon the offer to introduce the letter: "The court: . . . . 'Letters which have never been in the possession of the defendant cannot be admissible in evidence against him.' Mr. Black: 'There is no evidence in this case that the letter was found in his possession.' The court: 'He says he received it.'" This brings us to the second reason why the point now under consideration cannot be made here.

The objection that the letter was obtained from the defendants by an unlawful seizure is made for the first time in this court. It was not made on the trial in the court below. Such an objection as this, which is not suggested by the nature of the offered evidence, but depends upon the proof of an outside fact, should have been made on the trial. The defense should have proved that the Most letter was one of the letters illegally seized by the police, and should then have moved to exclude it, or opposed its admission, on the ground that it was obtained by such illegal seizure. This was not done, and therefore we cannot consider the constitutional question supposed to be involved.

The only objections made to the Most letter which we find in the record were: 1. That it was not proper cross-examination; 2. That it had not been answered by Spies.

The defendant Spies, on his direct examination, had explained his possession of two bombs with iron shells, by saying that an unknown person, who claimed to be a shoemaker named Schwope, and to be on his way from Cleveland to New Zealand, had called at the Arbeiter Zeitung office, and, asking Spies if he had seen one of the bombs "they" were making, had left the two iron shells, saying "he would not take them along." Spies also testified that a stranger had called at the office in his absence, and left two czar bombs on his desk, stating to the book-keeper or office-boy that he came merely to "inquire whether those were bombs of a good construction, and the man never called for them." He further testified that he procured the cartridges of dynamite and coils of fuse and detonating caps, found in his office, for the mere purpose of experimenting, without explaining why he wanted to experiment. He stated that he showed these things, or some of them, to the reporters, who swear to having seen them there, merely to give them something sensational to write about in their papers.

The Most letter and the questions about its contents were proper subjects for cross-examination, because they tended to test the sincerity of the claim made by him on his direct examination, that he had no serious object in view in keeping the dynamite and other articles which he had on hand. That letter shows on its face that some communication or message had passed between Spies and Most as to a "letter from the Hocking Valley." It also shows that Most proposed to send twenty or twenty-five pounds of what he calls "medicine, and the genuine article at that," to one Buchtell, and asks Spies for directions how to send it. Taken in connection with other evidence, the letter tended to show that Spies and Most were engaged in the very serious business of supplying dynamite to discontented laboring men.

The second objection to the letter was, that it was unanswered, and therefore inadmissible, on the ground that a letter written to a party by a third person, to which no reply is made, does not show an acquiescence in the facts stated in it. As we understand the evidence of the defendant Spies, he admits that this letter is in the handwriting of Most, and that he received it from Most, and read it. He does not say that he did not answer it, but that he does not remember whether he answered it or not. We do not think, however, that it can be regarded as an unanswered letter. To all intents and purposes it was answered. Spies swears that he did not himself give the directions asked for by Most in the letter as to shipping the "medicine" or "genuine article," but he also says: "There may have been a letter addressed to my care which I may have sent to him." If he procured a third person to write a letter, giving directions how to ship material to the point indicated, and then inclosed this letter to Most, he, in effect, answered the only portion of Most's letter which required an answer. Moreover, the letter shows in its opening sentences that it was "invited" by Spies (Wharton's Crim. Ev., 9th ed., secs. 644, 682), and that it was written in response to some former communication by him.

It is also objected that the cross-examination of those of the defendants who took the stand compelled them to give evidence against themselves. After a careful examination of the testimony of these defendants as set out in the record, we cannot see that they were cross-examined upon any subjects not connected with the direct examination. If a defendant offers himself as a witness to disprove a criminal charge, he cannot

excuse himself from answering on the ground that by so doing he may criminate himself. "So far as concerns questions touching the merits, the defendant, by making himself a witness as to the offense, waives his privileges as to all matters connected with the offense. It has been ruled also that, to affect his credibility, he may be asked whether . . . . he has been concerned in other crimes, part of the same system": Wharton's Crim. Ev., sec. 432.

Objection is also made that certain articles which had been struck and torn and otherwise injured through the explosion of the Haymarket bomb, and also through the explosion, by way of experiment, of certain bombs made by the defendant Lingg, were improperly introduced before the jury. It was the claim of the International Association, and its organs and speakers, constantly put forth by them to the workingmen to induce the latter to join the movement against the police and militia, that a dynamite bomb in the hands of one man was equal in destructive power to a regiment of soldiers armed with rifles. The articles in question were presented in the condition in which they were left after being exposed to the force of an exploding bomb, for the purpose of showing the power of dynamite as an explosive substance. While this kind of testimony may not have been very material, we cannot see that it was to such an extent incompetent as to justify a reversal.

It is also objected that the trial court allowed bombs, and cans containing dynamite, and prepared with contrivances for exploding it, which had been found under sidewalks and buried in the ground at certain points in the city, to be introduced in evidence. Among these were the bombs hidden by Lingg and Seliger under the sidewalk on Sigel Street, and those given by Lingg to Lehmann and buried by Lehmann near Ogden Grove, and those given by Lingg to Thielen and found upon the latter's premises. As specimens of the kind of weapons which Lingg and his associates were preparing, and as showing the malice and evil heart which the intended use of such weapons indicated, the introduction of bombs made by him was not improper. The jury had a right to see them and compare their structure with the descriptions of the bomb that killed Degan, with a view of determining whether Lingg was the maker of the latter or not. As to the fact that some of these bombs and cans, like those shown to the American group during their drill, were found buried near Wicker

Park, — one of the designated meeting-places, where certain of the armed men were to gather on Tuesday night, — this was a circumstance proper to be considered by the jury, in determining the nature and character of the conspiracy and its connection with the events of Tuesday night. As to the suggestion that these things may have been placed where they were found by other parties than those connected with the conspiracy herein described, it was for the jury to say whether, under all the circumstances, any others than the members of that conspiracy had undertaken to make such weapons, or knew anything about them.

It is again urged as error, that a witness on the part of the state, for whom Schnaubelt had been working, was allowed to testify that the latter cut off his beard a few days after the night of May 4th. In the photograph that has been referred to, he had a beard. Gilmore swore that Schnaubelt had a beard when the bomb was thrown. To explain the fact that he was seen without a beard after the Haymarket meeting, it was shown that he cut off his beard subsequently to the date of that meeting. The statement made by the witness was merely for the purpose of identification. It was not very important, and we cannot see that it did any harm.

It is also objected that some testimony was admitted as to conversations with the defendant Spies which were merely narrative of what had been or would be done. It is undoubtedly the law that, after a conspiracy is established, only those declarations of each member which are in furtherance of the common design can be introduced in evidence against the other members. Declarations that are merely narrative as to what has been done or will be done are incompetent, and should not be admitted except as against the defendant making them or in whose presence they are made. The utterances of the defendant Spies, whether in his paper, his speeches, or his conversations, were in furtherance of the purposes and objects of the conspiracy in which he was engaged. If testimony as to expressions used by him that are not of the character here indicated has crept into the record, it is so inconsiderable that it could not have in any way injured the other defendants. We think this point was sufficiently guarded by the trial judge in his rulings and in his instructions.

A further objection is made as to the order in which the trial court permitted certain portions of the evidence to be in-

troduced. It is claimed that some of the acts and declarations proven in the case were allowed to come in before proof was made of the conspiracy or of the connection of the defendants with it. This matter is largely discretionary with the trial judge.

The proof of conspiracy, which will authorize the introduction of evidence as to the acts and declarations of the co-conspirators, may be such proof only as is sufficient, in the opinion of the trial judge, to establish *prima facie* the act of conspiracy between the parties, or proper to be laid before the jury as tending to establish such fact: 1 Greenl. Ev., sec. 111. Sometimes, for the sake of convenience, the acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy; the prosecutor undertaking to furnish such proof in a subsequent stage of the cause: Id.

The rule that the conspiracy must be first established *prima facie* before the acts and declarations of one conspirator can be received in evidence against another, cannot well be enforced "where the proof of the conspiracy depends upon a vast amount of circumstantial evidence, a vast number of isolated and independent facts; and in any case where such acts and declarations are introduced in evidence, and the whole of the evidence introduced on the trial, taken together, shows that such a conspiracy actually exists, it will be considered immaterial whether the conspiracy was established before or after the introduction of such acts and declarations": *State* v. *Winner*, 17 Kan. 298. The prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy: Roscoe's Crim. Ev., 7th ed., 415.

In many important cases, evidence has been given of a general conspiracy before any proof of the particular part which the accused parties have taken: Roscoe's Crim. Ev., 7th ed., 415. In some peculiar instances in which it would be difficult to establish the defendant's privity without first proving the existence of a conspiracy, a deviation has been made from the general rule, and evidence of the acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendant's privity: Id. 414.

The term "acts," as here used, includes written correspondence and other papers relative to the main design: 1 Greenl. Ev., sec. 111.

Many other objections to different items of testimony are insisted upon by counsel for the defense. We have noticed those which have seemed to us to be the most important. Any further comment would swell this opinion, already of inordinate length, into still more tiresome proportions. Taking the whole record together, we are unable to see that the lower court committed any such errors, either in the admission or exclusion of evidence, as prejudiced the rights of the defendants.

The second class of errors assigned relates to the giving and refusal of instructions.

1. The instructions numbered 4 and 5½ which were given for the state are claimed to be erroneous because they did not require the prosecution to establish the identity of the bomb-thrower. The fourth instruction told the jury that, upon a given state of facts, certain members of the conspiracy mentioned would be guilty of murder, "whether the identity of the person throwing the bomb be established or not." Instruction No. 5½ said: "All of such conspirators are guilty of such murder, whether the person who perpetrated such murder can be identified or not," etc. The identity here intended had reference to name or personal description. The jury were expressly required by the fourth instruction to find, from the evidence, that the person throwing the bomb was, at the time, a member of the conspiracy to unlawfully resist the officers of the law, and that he threw the bomb "in pursuance of such conspiracy, and in furtherance of the common object." The theory of the fourth instruction was, that the bomb-thrower was sufficiently identified, if he belonged to the conspiracy, and if he threw the bomb to carry out the conspiracy and further its designs, even though his name and personal description were not known. We do not think that this theory was an erroneous one.

Counsel for plaintiffs in error say that "membership in the supposed conspiracy could not be proved without some evidence of identification." In the first place, some of the counts in the indictment charged that Rudolph Schnaubelt threw the bomb. Evidence was introduced tending to support these counts. If the jury believed it, they must have found that the crime was committed by a member of the conspiracy, the proof as to Schnaubelt's membership in it being uncontradicted.

In the next place, some of the counts in the indictment

charged that the bomb was thrown by an unknown person. All the proof introduced by the defendants themselves tending to show that Schnaubelt did not throw the bomb tended also to prove that an unknown person threw it. If the jury believed the evidence of the defense upon this subject, they had before them other testimony, from which they were justified in believing that the bomb-thrower, though unknown by name or personal description, was a member of the conspiracy, and acting in furtherance of its objects. This testimony, introduced by the state, tended to show that the bomb-thrower threw a bomb made on Tuesday afternoon by Lingg, the agent of the conspiracy; that he obtained it from a place where only a member of the conspiracy could have obtained it, and at a time when no one but such a member would have sought to obtain it; that he threw it at a meeting appointed by the conspiracy, from the midst of a company of persons belonging to the conspiracy, upon the happening of a contingency provided for by the conspiracy, and as part of an attack planned by the conspiracy. These and other circumstances already spoken of were sufficient to establish his membership.

It is a mistake to assume that a defendant cannot be charged with advising, encouraging, aiding, and abetting an unknown principal in the perpetration of a crime. Suppose that A instructs B to hire some person to kill C. B hires a person, whose name is unknown to A, and never becomes known to the state, and that person kills C in pursuance of B's employment. Will it be said that A is not guilty as an accessary before the fact because the instrument employed by B is unknown by name or personal description? Archbold says that if the principal felon be unknown, the indictment of the accessary may state it accordingly: 1 Pr. & Pl. 67. It is also held that if the principal is declared to be unknown in the indictment, and the proof on the trial shows that he is known, there is a fatal variance: *Rex* v. *Walker*, 3 Camp. 264; *Rex* v. *Blick*, 4 Car. & P. 377. But where there are two separate counts, one charging the principal to be known, and the other charging him to be unknown, it is sufficient if either is proven: 1 Wharton's Crim. Law, secs. 207, 225, 226, 231; 1 Bishop's Crim. Law, secs. 651, 677; *Regina* v. *Tyler*, 8 Car. & P. 616; *State* v. *Green*, 26 S. C. 103; *Pilger* v. *Commonwealth*, 112 Pa. St. 220; *Brennan* v. *People*, 15 Ill. 516; *Baxter* v. *People*, 3 Gilm. 368; *Ritzman* v. *People*, 110 Ill. 362. The objection that

the instructions on behalf of the state are faulty in not requiring the principal in the commission of the crime charged to be identified, is not well taken.

Counsel for plaintiffs in error make the general objection that the instructions for the state were at variance with the proof introduced by the state. If we understand the meaning of this objection, it is this: that some of the counts in the indictment having charged the defendants with advising, encouraging, aiding, and abetting Schnaubelt in the perpetration of the crime, and the state having introduced testimony to show that Schnaubelt did perpetrate the crime, therefore the instructions should have directed the attention of the jury solely and exclusively to the theory that Schnaubelt was the perpetrator of the crime, and that such instructions were erroneous in having called the attention of the jury to the theory that an unknown person may have been the perpetrator of the crime, notwithstanding the fact that some of the counts charged the defendants with advising, encouraging, aiding, and abetting an unknown person in the commission of the crime, and notwithstanding the fact that there was evidence in the record tending to show that the perpetrator of the crime was an unknown person. We regard this position as wholly untenable.

Under our statute and the construction given to it by the decisions of this court (*Baxter* v. *People*, 3 Gilm. 368, and other cases), the man who, "not being present aiding, abetting, or assisting, hath advised, encouraged, aided, or abetted the perpetration of the crime" may be considered as the principal in the commission of the crime, may be indicted as principal, and may be punished as principal. The indictment need not say anything about his having aided and abetted either a known principal or an unknown principal. It may simply charge him with having committed the murder as principal. Then, if, upon the trial, the proof shows that he aided, abetted, assisted, advised, or encouraged the perpetration of the crime, the charge that he committed it as principal is established against him. It would make no difference whether the proof showed that he so aided and abetted, etc., a known principal or an unknown principal.

In the case at bar some of the counts in the indictment charge the defendants with the murder of Degan as principals, and not as accessaries before the fact. If the jury believed, from the evidence, that the defendants aided, abetted, advised,

or encouraged the perpetration of such murder, then they were justified in finding the defendants guilty as principals, as charged in the indictment. The material question for them to consider was not so much whether the man who threw the bomb was a known person or an unknown person as whether these defendants aided, abetted, advised, or encouraged the throwing of the bomb.

The instructions commented upon, and not fully quoted in this opinion, are set out in the statement which precedes it. They will not be here quoted, except so far as may be necessary to understand the comments made upon them.

The portion of the fifth instruction for the state, which is complained of by the plaintiffs in error, is found in the following words: "Although the jury may further believe from the evidence that the time and place for the bringing about of such revolution or the destruction of such authorities had not been definitely agreed upon by the conspirators, but was left to them, and the exigencies of time or to the judgment of any of the conspirators."

It is said that there was no evidence in the record to support the hypothesis contained in the quotation here made. We think there was such evidence. The hypothesis is, that the time and place for bringing about the destruction of the authorities was left to the judgment of some of the conspirators, instead of being definitely agreed upon by all of them. The publication of the word "Ruhe" in the Arbeiter Zeitung was to indicate the time for the social revolution to begin, and for the armed men to gather at their meeting-places. Its publication was left to the judgment and discretion of a committee appointed by the conspirators. This committee was also to report to the armed men at what place the conflict with the police had occurred.

Counsel for plaintiffs in error claim that instruction No. 5½, given for the state, was erroneous mainly for the following reasons, to wit: 1. "Because it assumes that mere general advice to the public at large to commit deeds of violence, as contained in speeches or publications, without reference to the particular crime charged, and without specifying object, manner, time, or place, works responsibility as for murder"; 2. Because in it "there was the fatal error of an omission of all reference to the evidence," or, in other words, that "the jury are not told in it that if they find from the evidence so and so, then they can conclude thus and so."

As to the last objection, we think that the defect therein indicated was cured by the instruction which the trial judge gave to the jury *sua motu*. We have held that a judge of the circuit court is at liberty to instruct at his discretion if he reduces his instructions to writing, so that the jury can take them with them in considering their verdict: *Brown* v. *People*, 4 Gilm. 439; *Greene* v. *Lewis*, 13 Ill. 642. In this case, the judge who presided at the trial in the court below himself wrote an instruction and read it to the jury, which contained the following words: "What are the facts and what is the truth, the jury must determine from the evidence, and from that alone. If there are any unguarded expressions in any of the instructions which seem to assume the existence of any facts, or to be any intimation as to what is proved, all such expressions must be disregarded and the evidence only looked to to determine the facts." It is difficult to see how, after such a clear and explicit injunction as this, the jury could have made any finding that was not based on the evidence.

As to the first objection, if we construed the instruction to mean what counsel claim it to mean, we would be forced to agree with them that it was erroneous.

It is the duty of the jury to consider all the instructions together, and when this court can see that an instruction in the series, although not stating the law correctly, is qualified by others, so that the jury were not likely to be misled, the error will be obviated: *Toledo, Wabash, and Western R'y Co.* v. *Ingraham*, 77 Ill. 309.

Although an instruction, considered by itself, is too general, yet if it is properly limited by others given on the other side, so that it is not probable it could have misled the jury, judgment will not be reversed on account of such instruction: *Kendall* v. *Brown*, 86 Ill. 387; *Skiles* v. *Caruthers*, 88 Id. 458.

The supreme court of Iowa has said: "It is usually not practicable, in any one instruction, to present all the limitations and restrictions of which it is susceptible. These very frequently must be presented in other and distinct portions of the charge. The charge must be taken together, and if, when so considered, it fairly presents the law, and is not liable to misapprehension nor calculated to mislead, a cause should not be reversed simply because some one of the instructions may lay down the law without sufficient qualification": *Rice* v. *City of Des Moines*, 40 Iowa, 638.

The same court held in a criminal case, where the indict-

ment was for murder, that "instructions are all to be considered and construed together," and that an omission to state the law fully in one instruction, when the omission is fully supplied in another, does not constitute error: *State* v. *Maloy*, 44 Iowa, 104.

The supreme court of California said in a criminal case: "While some of the instructions are subject, perhaps, to criticism, and may not state the law with precise accuracy, yet, taken as a whole, they were substantially correct, and could not have misled the jury to the prejudice of the defendant": *People* v. *Cleveland*, 49 Cal. 577.

The principle here announced, that an instruction which is general in its character may be limited or qualified by other instructions in the series, does not contravene the rule that in a criminal case "material error in one instruction calculated to mislead is not cured by a subsequent contradictory instruction": Wharton on Criminal Pleading and Practice, 8th ed., sec. 793.

An application of the foregoing views to the instruction now under consideration will show that it could not have misled the jury to the prejudice of the defendants.

Counsel contend that the language of instruction No. 5½ was broad enough to lead the jury to believe that if some person other than either of the plaintiffs in error had advised and encouraged the commission of the murder, and the murder had been committed by reason of his advice and encouragement, the plaintiffs in error would be guilty, provided such person was a party with them to the conspiracy to excite to crime, etc. The instructions for the defense, however, limited the responsibility of the defendants to such advice and encouragement as were given by themselves alone.

In one instruction given for the defense, the court charged the jury as follows: "Unless the prosecution has established in the minds of the jury, beyond all reasonable doubt, that either some of the defendants threw the said bomb, or that the person who did so throw the same was acting under the advice and procurement of defendants or some of them, the defendants and all of them should be acquitted."

In another instruction given for the defense, the court said: "It will not do to guess away the lives or liberties of our citizens, nor is it proper that the jury should guess that the person who threw the bomb which killed Degan was instigated to do the act by the procurement of defendants, or any

of them. That fact must be established beyond all reasonable doubt in the minds of the jury," etc.

In still another instruction for the defense, the court said: "Therefore the jury must be satisfied beyond all reasonable doubt that the person throwing said bomb was acting as the result of the teaching or encouragement of defendants or some or them, before defendants can be held liable therefor, and this you must find from the evidence."

Counsel also claim that the instruction now under consideration may be construed to mean that mere general advice, in print or by speech, addressed to the public at large, urging them to commit deeds of violence, works responsibility for murder. If the instruction was too general in this regard, it was limited and qualified by other instructions given for the defendants.

In an instruction given for the defense, the court said to the jury: "It will not do to say that because defendants may have advised violence, that therefore, when violence came, it was the result of such advice. There must be a direct connection established by credible testimony between the advice and the consummation of the crime, to the satisfaction of the jury, beyond all reasonable doubt."

In another instruction for the defense,—and all the instructions for the defense were prepared by the defendants themselves, and the giving of them was asked by the defendants,—the court said: "Before a party can be lawfully convicted of the commission of a crime, under our statute concerning accessaries, it is incumbent on the prosecution to show, beyond all reasonable doubt, by credible evidence, that the crime was committed by some persons or person acting under the advice, aid, encouragement, abetting, or procurement of the defendant or defendants whose conviction is asked. Though the jury should believe from the evidence that a party in fact advised generally the commission, in certain contingencies, of acts amounting to crime, yet if the act complained of was in fact committed by some third party of his own mere volition, hatred, malice, or ill-will, and not materially influenced, either directly or indirectly, by such advice of the party charged, or if he was actuated only by the advice of other parties not charged, and for whose advice the defendants are not responsible, the party charged would not, in such case, be responsible."

In another instruction for the defense, the court said: "Al-

though the defendants or some of them may have spoken and also published their views to the effect that a social revolution should be brought about by force, and that the officers of the law should be resisted, and, to this end, dynamite should be used to the extent of taking human life; that persons should arm to resist the law; that the law should be throttled and killed; and although such language might cause persons to desire to carry out the advice given as aforesaid, and do the act which caused Officer Degan's death,—yet the bomb may have been thrown and Degan killed by some one unfamiliar with and unprompted by the teachings of defendants or any of them; therefore the jury must be satisfied beyond all reasonable doubt that the person throwing said bomb was acting as the result of the teaching or encouragement of defendants," etc.

The instruction last quoted, which was drawn by the counsel for the defense, and given at their request, recognizes and admits the claim that advising, encouraging, aiding, and abetting murder, within the meaning of our statute, may be effected through the utterance of such speeches and the publication of such articles as have been heretofore referred to. The only thing insisted upon in the instruction is, that the proof must show, clearly and beyond a reasonable doubt, the connection between the speeches and publications as the cause, and the murder as the result.

The last instruction given for the defendants limited the instructions having reference to general advice to commit murder, or general conspiracy to commit murder, by calling the attention of the jury specifically to the Monday night plot. It was as follows: —

"If the jury find that, on the evening of May 3d, at 54 West Lake Street, at a meeting at which some of the defendants were present, a proposition was adopted that, in the event of a collision between the police force, militia, or firemen on one side, and the striking laborers on the other, it was agreed that certain organizations of which some of the defendants were members should meet at certain designated places in the city of Chicago; that a committee should attend public places and public meetings where an attack by the police and others might be expected, and in the event of such attack being made, report the same to said armed sections, as aforesaid, to the end that such attack might be resisted and the police-stations of the city destroyed; and if the jury further find that,

on the night of May 4th, some person unknown went to a meeting at the Haymarket and threw a bomb into the assembled police, the explosion of which killed Matthias J. Degan, and that, from all the evidence in the case, the jury are not satisfied beyond all reasonable doubt that said act causing the death of said Degan was the result of any act in furtherance of the common design as herein stated, but may have been the unauthorized and the individual act of some person acting upon his own responsibility and volition, then none of the defendants can be held responsible therefor on account of said West Lake Street meeting."

But instruction No. 5½ will not be found to be so general in character as it is claimed to be, if its language is carefully analyzed and considered in connection with other instructions given for the state.

The persons referred to therein as being excited to tumult and riot, and to the use of deadly weapons and to the taking of life, are "the people, or classes of people, of this city." The expression is in the alternative. "Classes of people of this city" are words which, when construed in the light of the evidence in this record, could only have been understood to designate workingmen of the city of Chicago connected with the groups already referred to. The persons advised by print or speech to commit murder were the same persons who were excited to tumult and riot, etc. Therefore, the instruction, fairly interpreted, means that the persons advised to commit murder were the workingmen belonging to and acting with the International groups, and that the murder spoken of as resulting from the advice given was murder committed by one or more of such workingmen. It is said that the instruction does not indicate the murder of Degan, but speaks simply of murder generally. It was not necessary to repeat the name of Degan in every instruction. The instructions must be considered together, and as Degan's name was mentioned in the two instructions preceding and the one following No. 5½, the jury could not have been misled upon this subject. The words, "whether the person who perpetrated such murder can be identified or not," could have referred to no one else than the man who threw the bomb that killed Degan.

The words, "without designating time, place, or occasion," must be taken with the qualification given to them in the fifth instruction, that is to say, such time, place, and occasion as

the committee of the conspirators appointed for that purpose might designate.

According to the theory of this instruction, the defendants conspired to excite certain classes to tumult, riot, use of weapons, and taking of life, "as a means to carry their designs and purposes into effect." The instruction does not specify what those designs and purposes are, because they had been stated in the two preceding instructions to be the bringing about of a social revolution and the destruction of the authorities of the city. The ordinary workingman had two purposes in view: 1. To get an eight-hour day of labor; 2. To keep the police from interfering to protect non-union laborers against strikers. The defendants in this case cared nothing about the eight-hour movement, or the contentions between union and non-union men. They looked beyond, to the social revolution. They sought to make use of the excitement among the workingmen over the eight-hour movement and over the attacks of police upon strikers, in order to create riot and tumult, and thus precipitate the social revolution. The stirring up of riot and tumult was with them a means to an end. There is testimony tending to support this view. The men who excited the tumult and riot by print and speech may have had a different end in view from that sought by the classes whom they so excited. But they were none the less responsible for murder that resulted from their aid and encouragement.

If the defendants, as a means of bringing about the social revolution, and as a part of the larger conspiracy to effect such revolution, also conspired to excite classes of workingmen in Chicago into sedition, tumult, and riot, and to the use of deadly weapons, and the taking of human life, and for the purpose of producing such tumult, riot, use of weapons, and taking of life, advised and encouraged such classes by newspaper articles and speeches to murder the authorities of the city, and a murder of a policeman resulted from such advice and encouragement, then defendants are responsible therefor.

It is a familiar doctrine of the law, in criminal cases, that if a reasonable doubt of the guilt of the prisoner is entertained, the jury have no discretion, but must acquit. The twelfth and thirteenth instructions for the prosecution are objected to as not correctly stating to the jury the meaning of "reasonable doubt." The twelfth instruction is an exact copy, *verbatim et literatim*, of the sixth instruction in *Miller* v. *People*, 39 Ill. 457, which we approved in that case, and which, since that case, we have in-

dorsed as correct in at least three cases, to wit: *May* v. *People*, 60 Ill. 119, *Connaghan* v. *People*, 88 Id. 460, and *Dunn* v. *People*, 109 Id. 635.

The portion of the thirteenth instruction which plaintiffs in error complain of, is that which is contained in the following words: "You are not at liberty to disbelieve as jurors, if from the evidence you believe as men." This expression has been sanctioned by the supreme court of Pennsylvania as having been properly used in an instruction given to the jury by a trial judge, and we are inclined to follow the ruling there laid down. That court said, in *Nevling* v. *Commonwealth*, 98 Pa. St. 322: "The learned judge then proceeded to say that the doubt must be a reasonable one, and that jurymen could not doubt as jurymen what they believed as men. In all this there was no error. It is the familiar language found in the text-books and decisions which treat of the subject."

By the twelfth and thirteenth instructions, considered in connection with the eleventh instruction for the state, and also in connection with the definitions of reasonable doubt as embodied in the instructions given for the defense, we think the law upon this subject was correctly presented to the jury.

The statute of this state provides that "juries in all criminal cases shall be judges of the law and fact." Instruction No. 13½, given for the prosecution, is objected to as improperly limiting and qualifying this provision of the statute. It tells the jury that "if they can say, upon their oaths, that they know the law better than the court itself, they have the right to do so," . . . . but that "before saying this, upon their oaths, it is their duty to reflect whether from their study and experience they are better qualified to judge of the law than the court," etc.

The language of instruction No. 13½ is an exact copy, *verbatim et literatim*, of the language used by this court in *Schnier* v. *People*, 23 Ill. 17. The views expressed in *Schnier* v. *People*, *supra*, have been approved of and indorsed in *Fisher* v. *People*, 23 Id. 218, *Mullinix* v. *People*, 76 Id. 211, and *Davison* v. *People*, 90 Id. 221. The question is settled, and we see no reason to retreat from our position upon this subject.

It is also claimed that the court erred in refusing to give certain instructions asked by the defendants. The refusal of refused instructions numbered 3, 8, 9, 11, and 18 is especially insisted upon as error.

Instruction No. 3 was properly refused because it told the

jury that those of the defendants who were not present at the Haymarket, counseling, aiding, or abetting the throwing of the bomb should be acquitted. Under our statute and the decision of this court in *Brennan* v. *People*, 15 Ill. 517, the defendants were guilty if they advised and encouraged the murder to be committed, although they may not have been present.

Instruction No. 8 was wrong for a number of reasons, but it is sufficient to refer to one: It assumes that "a conspiracy to bring about a change of government, ... by peaceful means, if possible, but, if necessary, to resort to force for that purpose" is not unlawful. The fact that the conspirators may not have intended to resort to force unless, in their judgment, they should deem it necessary to do so, would not make their conspiracy any the less unlawful.

All that was material in instructions 9, 11, and 18 was embodied in the instructions which were given for the defendants.

The defendants also complain that the court refused to give an instruction for them which contained the following statement: "It cannot be material in this case that defendants or some of them are or may be socialists, communists, or anarchists," etc.

If there was a conspiracy, it was material to show its purposes and objects, with a view of determining whether and in what respects it was unlawful. Anarchy is the absence of government; it is a state of society where there is no law or supreme power. If the conspiracy had for its object the destruction of the law and the government, and of the police and militia as the representatives of law and government, it had for its object the bringing about of practical anarchy. Whether or not the defendants were anarchists may have been a proper circumstance to be considered in connection with all the other circumstances in the case, with a view of showing what connection, if any, they had with the conspiracy, and what were their purposes in joining it. Therefore, we cannot say that it was error to refuse an instruction containing such a broad declaration as that announced in the above quotation.

Defendants further complain because the instruction numbered 13, which was asked by them, was refused by the trial court. The refusal of this instruction was not error. It was proper enough, so far as it stated that if a person at the Haymarket, "without the knowledge, aid, counsel, procurement, encouragement, or abetting of the defendants, or any of them,

then or theretofore given, ... threw a bomb among the police, wherefrom resulted the murder or homicide charged in the indictment, then the defendants would not be liable for the results of such bomb," etc. But the instruction is so ingeniously worded as to lead the jury to believe that the person who threw the bomb at the Haymarket was justified in doing so if the meeting there was lawfully convened and peaceably conducted, and if the order to disperse was unauthorized and illegal. Counsel inject into the instruction the hypothesis that the bomb may have been thrown by an outside party, "in pursuance of his view of the right of self-defense." A mere order to disperse cannot be an excuse for throwing a dynamite bomb into a body of policemen. If the bomb-thrower had been illegally and improperly attacked by the police while quietly attending a peaceable meeting, and had thrown the bomb to defend himself against such attack, another question would be presented. The vice of the instruction lies in the insidious intimation embodied in it,—that when a body of policemen, even if in excess of their authority, give a verbal order to an assemblage to disperse, a member of that assemblage will be excusable for throwing a bomb on the ground of self-defense, and because of the supposed invasion of his rights.

The instruction given by the court of its own motion, and which has already been referred to, is also claimed to be erroneous. So far as it speaks of murder and advice to commit murder in general terms, it is sufficiently limited and qualified, when read in connection with all the other instructions, to which it specifically calls attention. It does not supersede and stand as a substitute for the other instructions, given for both sides. It does not so purport upon its face. On the contrary, the jury are directed to "carefully scrutinize" such other instructions, and are told that their apparent inconsistencies will disappear under such scrutiny. In the last sentence, they are requested to disregard any unguarded expressions that may have crept into the instructions, "which seem to assume the existence of any facts," and look only to the evidence, etc. Why caution the jury to disregard certain expressions of a particular kind in the other instructions, if the latter were to be entirely superseded? We do not think that the instruction given by the trial judge *sua motu* is obnoxious to the objections urged against it.

Defendants also object to the instruction as to the form of

the verdict as being erroneous. It is claimed that the jury were obliged, under this instruction, to find the defendants either guilty or not guilty of murder, whereas the jury were entitled to find that the offense was a lower grade of homicide than murder, if the evidence so warranted. This position is fully answered by our decisions in the cases of *Dunn* v. *People*, 109 Ill. 646, and *Dacey* v. *People*, 116 Id. 555. If counsel desired to have the jury differently instructed as to the form of the verdict, they should have prepared an instruction indicating such form as they deemed to be correct, and should have asked the trial court to give it. They did not do so, and are in no position to complain here.

The court, at the request of the defendants, did give the jury an instruction, defining manslaughter in the words of the statute and specifying the punishment therefor as fixed by the statute. The court also gave the jury the following instruction: "The jury are instructed that under an indictment for murder, a party accused may be found guilty of manslaughter; and in this case, if from a full and careful consideration of all the evidence before you, you believe beyond a reasonable doubt that the defendants, or any of them, are guilty of manslaughter, you may so find by your verdict."

The next error assigned has reference to the impaneling of the jury. The counsel for plaintiffs in error have made an able and elaborate argument for the purpose of showing that the jury which tried this case was not an impartial jury, in the sense in which the word "impartial" is used in our constitution. We do not deem a consideration of all the points presented as necessary to a determination of the case, and shall only notice those that seem to us to be material.

Nine hundred and eighty-one men were called into the jury-box and sworn to answer questions. Each one of the eight defendants was entitled to a peremptory challenge of twenty jurors, making the whole number of peremptory challenges allowed to the defense one hundred and sixty. The state was entitled to the same number. Seven hundred and fifty-seven were excused upon challenge for cause. One hundred and sixty were challenged peremptorily by the defense, and fifty-two by the state.

Of the twelve jurors who tried the case, eleven were accepted by the defendants. They challenged one of these, whose name was Denker, for cause, but after the court overruled the challenge, they proceeded to further question him

and finally accepted him, although one hundred and forty-two of their peremptory challenges were at that time unused. They accepted the ten others, including the juror Adams, without objection. When Adams, the eleventh juror, was taken, they had forty-three peremptory challenges which they had not yet used.

Therefore, as to eleven of the jurymen, the defendants are estopped from complaining. They virtually agreed to be tried by them, because they accepted them, when, by the exercise of their unused peremptory challenges, they could have compelled every one of them to stand aside.

Counsel for the defense complain that the trial court overruled their challenges for cause of twenty-six talesmen, to whose examinations they specifically call our attention. As they afterwards peremptorily challenged the talesmen so referred to, no one of them sat upon the jury. Every one of these twenty-six men had been peremptorily challenged before the eleventh juror was taken.

After the eleventh juror was accepted, the forty-three peremptory challenges which then remained to the defendants were all used by them before the twelfth juror was taken.

After the defendants had examined the twelfth juror, whose name was Sanford, they challenged him for cause. Their challenge was overruled, and they excepted.

The 160 talesmen who were peremptorily challenged by defendants were first challenged for cause, and the challenges for cause were overruled by the trial court. It is claimed that, inasmuch as the defendants exhausted all their peremptory challenges before the panel was finally completed, the action of the court in regard to these particular jurors will be considered, and if erroneous, such action is good ground of reversal. We think it must be made to appear that an objectionable juror was put upon the defendants after they had exhausted their peremptory challenges. "Unless objection is shown to one or more of the jury who tried the case, the antecedent rulings of the court upon the competency or incompetency of jurors who have been challenged and stood aside will not be inquired into in this court": *Holt* v. *State*, 9 Tex. App. 571.

We cannot reverse this judgment for errors committed in the lower court in overruling challenges for cause to jurors, even though defendants exhausted their peremptory challenges, unless it is further shown that an objectionable juror

was forced upon them, and sat upon the case after they had exhausted their peremptory challenges. This doctrine is ably discussed in *Loggins* v. *State*, 12 Tex. App. 65. We think the reasoning in that case is sound, and answers the objection here made.

In addition to this reason, we have carefully considered the examinations of the several jurors challenged by the defendants peremptorily, and while we cannot approve all that was said by the trial judge in respect to some of them, we find no such error in the rulings of the court, in overruling the challenges for cause as to any of them, as would justify a reversal of the cause. The examinations, as they appear in the record of the forty-three talesmen, who were challenged peremptorily after the eleventh juror was accepted, show that many of the forty-three challenges were exercised arbitrarily, and without any apparent cause. Such challenges were not compelled by any demonstrated unfitness of the jurors, but seem to have been used up for no other purpose than to force the selection of one juror after the forty-three challenges were exhausted.

The only question, then, which we deem it material to consider is, Did the trial court err in overruling the challenge for cause of Sanford, the twelfth juror; or, in other words, was he a competent juror?

The following is the material portion of his examination:—

"Have you an opinion as to whether or not there was an offense committed at the Haymarket meeting by the throwing of the bomb? A. Yes. Q. Now, from all that you have read, and all that you have heard, have you an opinion as to the guilt or innocence of any of the eight defendants of the throwing of that bomb? A. Yes. Q. You have an opinion upon that question also? A. I have. . . . . Q. Now, if you should be selected as a juror in this case, to try and determine it, do you believe that you could exercise legally the duties of a juror; that you could listen to the testimony, and all of the testimony, and the charge of the court, and after deliberation, return a verdict which would be right and fair as between the defendants and the people of the state of Illinois? A. Yes, sir. Q. You believe that you could do that? A. Yes, sir. Q. You could fairly and impartially listen to the testimony that is introduced here? A. Yes. Q. And the charge of the court, and render an impartial verdict, you believe? A. Yes. Q. Have you any knowledge of the principles con-

tended for by socialists, communists, and anarchists? A. Nothing, except what I read in the papers. Q. Just general reading? A. Yes. Q. You are not a socialist, I presume, or a communist? A. No, sir. Q. Have you a prejudice against them, from what you have read in the papers? A. Decided. Q. Do you believe that that would influence your verdict in this case, or would you try the real issue which is here, as to whether these defendants were guilty of the murder of Mr. Degan or not, or would you try the question of socialism and anarchism, which really has nothing to do with the case? A. Well, as I know so little about it in reality at present, it is a pretty hard question to answer. Q. You would undertake, you would attempt of course, to try the case upon the evidence introduced here upon the issue which is presented here? A. Yes, sir. . . . . Q. Well, then, so far as that is concerned, I do not care very much what your opinion may be now, for your opinion now is made up of random conversations and from newspaper reading, as I understand? A. Yes. Q. That is nothing reliable. You do not regard that as being in the nature of sworn testimony at all, do you? A. No. Q. Now, when the testimony is introduced here, and the witnesses are examined, you see them and look into their countenances, judge who are worthy of belief and who are not worthy of belief, don't you think, then, you would be able to determine the question? A. Yes. Q. Regardless of any impression that you might have, or any opinion? A. Yes. Q. Have you any opposition to the organization by laboring men of associations or societies or unions, so far as they have reference to their own advancement and protection, and are not in violation of law? A. No, sir. Q. Do you know any of the mem' ers of the police force of the city of Chicago? A. Not one by name. Q. You are not acquainted with any one that was either injured or killed, I suppose, at the Haymarket meeting? A. No. . . . . Q. If you should be selected as a juror in this case, do you believe that, regardless of all prejudice or opinion which you now have, you could listen to the legitimate testimony introduced in court, and upon that, and that alone, render and return a fair and impartial, unprejudiced, and unbiased verdict? A. Yes."

The foregoing examination was by the defense. The following was by the state: —

"Q. Upon what is your opinion founded, — upon newspaper reports? A. Well, it is founded on the general theory and

what I read in the newspapers. Q. And what you read in the papers? A. Yes, sir. Q. Have you ever talked with any one that was present at the Haymarket at the time the bomb was thrown? A. No, sir. Q. Have you ever talked with any one who professed of his own knowledge to know anything about the connection of the defendants with the throwing of that bomb? A. No. Q. Have you ever said to any one whether or not you believed the statements of facts in the newspapers to be true? A. I have never expressed it exactly in that way; but still I have no reason to think they were false. Q. Well, the question is not what your opinion of that was. The question simply is, — it is a question made necessary by our statute, perhaps? A. Well, I don't recall whether I have or not. Q. So far as you know, then, you never have? A. No, sir. Q. Do you believe that, if taken as a juror, you can try this case fairly and impartially, and render a verdict upon the law and the evidence? A. Yes."

It is objected that Sanford had formed such an opinion as disqualified him from sitting upon the jury.

It is apparent from the foregoing examination that the opinion of the juror was based upon rumor or newspaper statements, and that he had expressed no opinion as to the truth of such rumors or statements. He stated upon oath that he believed he could fairly and impartially render a verdict in the case in accordance with the law and the evidence. That the trial court was satisfied of the truth of his statement would appear from the fact that the challenge for cause was overruled.

Therefore, the examination of the juror shows a state of facts which brings his case exactly within the scope and meaning of the third proviso of section 14 of chapter 78, entitled "Jurors," of our Revised Statutes. That proviso is as follows: "And provided further, that in the trial of any criminal cause the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall, upon oath, state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement."

In *Wilson* v. *People*, 94 Ill. 299, one William Gray was examined touching his qualifications as a juror, and said: "I

have read newspaper accounts of the commission of the crime with which the defendant is charged, and have also conversed with several persons in regard to it since coming to Carthage, and during my attendance upon this term of court; do not know whether they are witnesses in the case or not; do not know who the witnesses in the case are. From accounts I have read, and from conversations I have had, I have formed an opinion in the case; would have an opinion now if the facts should turn out as I heard them, and I think it would take some evidence to remove that opinion; would be governed by the evidence in the case, and can give the defendant a fair and impartial trial, according to the law and the evidence." Gray was challenged for cause, and the challenge overruled by the trial court. We held that all objection to Gray's competency was clearly removed by the proviso above quoted. We also there said: "The opinion formed seems not to have been decided, but one of a light and transient character, which at no time would have disqualified the juror from serving."

The expressions of Sanford in the case at bar as to the opinion formed by him are not so strong as those used by Gray in the Wilson case in regard to his opinion. Sanford's impressions were not such as would refuse to yield to the testimony that might be offered; nor were they such as to close his mind to a fair consideration of the testimony. They were not "strong and deep impressions," such as are referred to by Chief Justice Marshall, when he said, upon the trial of Aaron Burr for treason: "Those strong and deep impressions which will close the mind against the testimony which may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection" to a juror: 1 Burr's Trial, 416.

Counsel for the defense seem to claim, in their argument, that the proviso above quoted is unconstitutional, in that it violates section 9 of article 2 of the present constitution of this state, which guarantees to the accused party in every criminal prosecution "a speedy, public trial, by an impartial jury of the county or district in which the offense is alleged to have been committed." We do not think that the proviso is unconstitutional for the reason stated. The rule which it lays down, when wisely applied, does not lead to the selection of partial jurors. On the contrary, it tends to secure intelligence in the jury-box, and to exclude from it that dense ignorance which has often subjected the jury-system to just criticism. A stat-

ute upon this subject similar to ours, and attacked as unconstitutional for the same reason here indicated, was held to be constitutional by the court of appeals in the state of New York, in *Stokes* v. *People*, 53 N. Y. 171; 13 Am. Rep. 492.

The juror Sanford further stated that he had a prejudice against socialists, communists, and anarchists. This did not disqualify him from sitting as a juror. If the theories of the anarchist should be carried into practical effect, they would involve the destruction of all law and government. Law and government cannot be abolished without revolution, bloodshed, and murder. The socialist or communist, if he attempted to put into practical operation his doctrine of a community of property, would destroy individual rights in property. Practically considered, the idea of taking a man's property from him without his consent, for the purpose of putting it into a common fund for the benefit of the commu nity at large, involves the commission of theft and robbery. Therefore, the prejudice which the ordinary citizen, who looks at things from a practical standpoint, would have against anarchism and communism, would be nothing more than a prejudice against crime.

In *Winnesheik Insurance Co.* v. *Schueller*, 60 Ill. 465, we said: "A man may have a prejudice against crime, against a mean action, against dishonesty, and still be a competent juror. This is proper, and such prejudice will never force a jury to prejudge an innocent and honest man." In *Robinson* v. *Randall*, *supra*, we again said: "The mere fact, therefore, that a juror may have a prejudice against crime does not disqualify him as a juror. A juror may be prejudiced against larceny, or burglary, or murder, and yet such fact would not in the least disqualify him from sitting upon a jury to try some person who might be charged with one of these crimes."

Sanford stated that he would "attempt to try the case upon the evidence introduced here upon the issue which is presented here." The issue presented was whether the defendants were guilty or not guilty of the murder of Matthias J. Degan. Any prejudice against communism or anarchism would not render a juror incapable of trying that issue fairly and impartially.

We cannot see that the trial court erred in overruling the challenge for cause of the twelfth juror. This being so, it does not appear that the defendants were injured, or that their rights were in any way prejudiced by his selection as a juryman.

On the motion for a new trial, the defendants read three affidavits, for the purpose of showing that shortly after May 4, 1886, two of the jurors had given utterance to expressions showing prejudice against the defendants. The two jurors made counter-affidavits, denying that they used the expressions attributed to them.

We do not think that the affidavits satisfactorily proved previously expressed opinions on the part of the two jurors referred to. It is a dangerous practice to allow verdicts to be set aside upon *ex parte* affidavits as to what jurors are claimed to have said before they were summoned to act as jurymen. The parties making such affidavits submit to no cross-examination, and the correctness of their statements is subjected to no test whatever. We adhere to the views which we have recently expressed upon this subject in the case of *Hughes* v. *People*, 116 Ill. 330.

The defendants claim that although they were entitled to one hundred and sixty peremptory challenges, yet the state was entitled to only twenty, and they charged it as error that the state was allowed to peremptorily challenge more than twenty talesmen. The statute says: "The attorney prosecuting on behalf of the people shall be admitted to a peremptory challenge of the same number of jurors that the accused is entitled to": R. S., c. 38, sec. 432. We cannot conceive how language can be plainer than that here used. It explains itself, and requires no further remark.

The defendants also claim that the trial court erred in refusing a separate trial from the other defendants to the defendants Spies, Schwab, Fielden, Neebe, and Parsons. Error cannot be assigned upon the refusal to grant separate trials where several are jointly indicted. It was a matter of discretion with the court below. We so decided in *Maton* v. *People*, 15 Ill. 536. We are unable to see any abuse of the discretion in this case.

Defendants also take exceptions to the conduct of the special bailiff. The regular panel having been exhausted, and the defendants having objected "to the sheriff summoning a sufficient number of persons to fill the panel" of jurors, the court appointed a special bailiff named Ryce to summon such persons, under section 13, chapter 78, of the Revised Statutes. On the motion for new trial, defendants read the affidavit of one Stevens, in which Stevens swore that he had heard one Favor say that he, Favor, had heard Ryce say that he, Ryce,

was summoning as jurors such men as the defense would be compelled to challenge peremptorily, etc. The defendants then made a motion, based upon this affidavit, that Favor be compelled to come into court and testify to what Ryce had said to him. The refusal of the court to grant the application is complained of as error.

The statements in the affidavit were mere hearsay, and were too indefinite and remote to base any motion upon. Moreover, if Ryce did make the remark in question to Favor, it does not appear that defendants were harmed by it. There is nothing to show that Ryce made any remarks of any kind, proper or improper, to the jurors whom he summoned. In addition to this, it is not shown that the defendants served Favor with a subpœna, so as to lay a foundation for compelling his attendance.

We think that the course pursued on the trial in regard to the manner of impaneling the jury was correct, and in accordance with the plain meaning of section 21, chapter 78, of the Revised Statutes. That section says "that the jury shall be passed upon and accepted in panels of four by the parties, commencing with the plaintiff." The state is not called upon to tender the defendants a second panel before the defendants tender it back four.

We cannot see that the remarks of the state's attorney, in his argument to the jury, were marked by any such improprieties as require a reversal of the judgment: *Wilson* v. *People*, *supra;* *Garrity* v. *People*, 107 Ill. 162.

In their lengthy argument, counsel for the defense make some other points of minor importance, which are not here noticed. As to these, it is sufficient to say that we have considered them and do not regard them as well taken.

The judgment of the criminal court of Cook County is affirmed.

Judgment affirmed.

MULKEY, J. Not intending to file a separate opinion, as I should have done had health permitted, I desire to avail myself of this occasion to say from the bench, that while I concur in the conclusion reached, and also in the general view presented in the opinion filed, I do not wish to be understood as holding that the record is free from error, for I do not think it is. I am nevertheless of opinion that none of the errors complained of are of so serious a character as to require a reversal of the judgment.

In view of the number of defendants on trial, the great length of time it was in progress, the vast amount of testimony offered and passed upon by the court, and the almost numberless rulings the court was required to make, the wonder with me is that the errors were not more numerous and more serious than they are.

In short, after having carefully examined the record, and given all the questions arising upon it my very best thought, with an earnest and conscientious desire to faithfully discharge my whole duty, I am fully satisfied that the conclusion reached vindicates the law, does complete justice between the prisoners and the state, and that it is fully warranted by the law and the evidence.

THIS CASE was subsequently argued in the supreme court of the United States, — *Spies* v. *Illinois*, 123 U. S. 131, — having come before that court upon a petition for a writ of error which had been first presented to Mr. Justice Harlan. Upon the application itself, the court, Mr. Chief Justice Waite, said: "When, as in this case, application is made to us, on the suggestion of one of our number, to whom a similar application had been previously addressed, for the allowance of a writ of error to the highest court of a state, under section 709 of the Revised Statutes, it is our duty to ascertain, not only whether any question reviewable here was made and decided in the court below, but whether it is of a character to justify us in bringing the judgment here for re-examination. In our opinion, the writ ought not to be allowed by the court, if it appears from the face of the record that the decision of the federal question which is complained of was so plainly right as not to require argument, and especially if it is in accordance with our well-considered judgments in similar cases." The court then proceeds to a consideration of the questions involved in the case, as determining its jurisdiction. These questions were: 1. The validity of a state statute which it was claimed was repugnant to the constitution of the United States, and under which a trial jury was selected and impaneled; 2. That the decision of the state court was against the right and privilege which the petitioners had, under the constitution of the United States, to a trial by an impartial jury; 3. That the statute, as construed by the court, abridged the rights and privileges of the petitioners, contrary to the fourteenth amendment of the federal constitution; 4. That the petitioners were compelled to give evidence against themselves, contrary to the provisions of the constitution of the United States; 5. That the petitioners were denied the "equal protection of the laws," guaranteed by the fourteenth amendment of the constitution. Articles 4, 5, 6, and 14 of the amendments of the constitution were particularly relied on by the petitioners. It was held "that the first ten articles of amendment were not intended to limit the powers of state governments in respect to their own people, but to operate on the national government alone"; and upon the point "that the trial court, acting under this [state] statute, and in accordance with its requirements, compelled the petitioners, against their will, to submit to a trial by a jury that was not impartial, and thus deprived them of one of the fundamental rights which they had, as citizens of the United States, under the national constitution, and if the sentence of

death is carried into execution, they will be deprived of their lives without due process of law," it was decided that the statute, as construed by the trial court, was not repugnant to the constitution of the state or of the United States, and was therefore not open to the objection made to it by the petitioners. The cases of *Hopt* v. *Utah*, 120 U. S. 430, and *Hayes* v. *Missouri*, 120 Id. 68, 71, in regard to a challenge by a defendant in a criminal action by a juror, were both affirmed; and the case of *Smith* v. *Eames*, 3 Scam. 76, 81, and the note thereto 36 Am. Dec. 521, wherein the law as to challenges to jurors is fully discussed, is specially referred to by the court. Upon the question raised — under the provisions above referred to of the federal constitution — that the defendant Spies had been compelled to testify against himself upon cross-examination, he having offered himself as a voluntary witness, it was said that: "Whether a cross-examination must be confined to matters pertinent to the testimony in chief, or may be extended to the matters in issue, is certainly a question of state law, as administered in the courts of the state, and not of federal law." As to the alleged unreasonable search and seizure of certain property and papers of the defendants, and especially of a certain letter of Most, about which Spies was cross-examined, it appeared that the objection was not made in the court below, and the court declared that "to give us jurisdiction, under section 709 of the Revised Statutes, because of the denial by a state court of any right, privilege, or immunity claimed under the constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was 'specially set up or claimed' at the proper time, in the proper way. To be reviewable here, the decision must be against the right so set up or claimed. As the supreme court of the state was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more. This is not . . . . a question of a waiver of a right under the constitution, laws, or treaties of the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive so far as the right of review here is concerned"; and the same determination was arrived at in regard to the claim raised in behalf of Spies and Fielden, — "Spies having been born in Germany, and Fielden in Great Britain, — that they [had] been denied, by the decision of the court below, rights guaranteed to them by treaties between the United States and their respective countries"; and the objection "that the defendants were not actually present in the supreme court of the state at the time the sentence was pronounced" was disposed of on the ground that it did not appear of record that they were not present, and if this were not true, the record must be corrected below, and that it would "be time enough to consider whether the objection presents a federal question when the correction has been made." The judgment of the court was, that "being of opinion that the federal questions presented by the counsel for the petitioners, and which they say they desire to argue, are not involved in the determination of the case as it appears on the face of the record, we deny the writ"; and the petition was therefore dismissed.

CONSPIRACY DEFINED: See note 51 Am. Dec. 82; *United States* v. *Goldberg*, 7 Biss. 175; 4 Lawson's Criminal Defenses, ed. 1887, 565; *Commonwealth* v. *Hunt*, 4 Met. 111; 38 Am. Dec. 347; 4 Lawson's Criminal Defenses, ed. 1887, 537; *State* v. *Wilson*, 30 Conn. 500, 507; *Johnson* v. *State*, 26 N. J. L. 313; *United States* v. *Nunnemacher*, 7 Biss. 111; *State* v. *Norton*, 23 N. J. L. 33, 44.

CHARACTER AND NATURE OF THE OFFENSE: See note 51 Am. Dec. 82. Generally, in the various states conspiracy is indictable as a common-law offense, or exists as such outside of the statutes: *State* v. *Norton*, 23 N. J. L. 33; *State* v. *Pulle*, 12 Minn. 164; *State* v. *Cawood*, 2 Stew. 360; *Commonwealth* v. *Hunt*, 4 Met. 111; 38 Am. Dec. 347; 4 Lawson's Criminal Defenses, ed. 1887, 537. But see *State* v. *Ohio etc. R. R. Co.*, 23 Ind. 362; *Beal* v. *State*, 15 Id. 378; *Estes* v. *Carter*, 10 Iowa, 400. And conspiracy, at the common law, is not cognizable as such in the federal courts, not being defined by any act of Congress as an offense against the United States: *United States* v. *Martin*, 4 Cliff. 156; *United States* v. *Walsh*, 5 Dill. 58; 4 Lawson's Criminal Defenses, ed. 1887, 561, 562.

WHAT CONSTITUTES INDICTABLE CONSPIRACY. — To constitute indictable conspiracy, there must be a combination of two or more persons to commit some act known as an offense at common law, or that has been declared such by statute: *Alderman* v. *People*, 4 Mich. 414; 69 Am. Dec. 321; *People* v. *Richards*, 1 Mich. 216; 51 Am. Dec. 75, and note 83, 90; *State* v. *Noyes*, 25 Vt. 415, 421; *Commonwealth* v. *Hunt*, 4 Met. 111; 38 Am. Dec. 347; 4 Lawson's Criminal Defenses, ed. 1887, 537; though "it is by no means necessary that the offense be *malum in se*. It is sufficient if it be criminal, or even be prohibited under penalties by statute": *Hazen* v. *Commonwealth*, 23 Pa. St. 355, 363. A conspiracy may be indictable, although the act contemplated be not itself indictable, or where the act intended, if committed by an individual, would not be criminal: *State* v. *Norton*, 23 N. J. L. 33, 44, and cases cited; *State* v. *Rowley*, 12 Conn. 101; note to 51 Am. Dec. 83. And "an indictment lies, not only where a conspiracy is entered into for an illegal purpose, but also where it is to effect a legal purpose by the use of unlawful means, and this, although such purpose be not effected": *Hazen* v. *Commonwealth*, 23 Pa. St. 354, 363. So an indictment may be brought for conspiracy to procure criminal process for improper purposes against the officer who executes the same, the prosecutor, and all others concerned in the matter: *Slomer* v. *People*, 25 Ill. 70; 76 Am. Dec. 786. But so long as the design rests merely in intention, it is not indictable: 4 Lawson's Criminal Defenses, ed. 1887, p. 616, sec. 217.

CONSPIRACIES TO COMMIT CRIMES OR MISDEMEANORS, OR TO INDUCE OTHERS TO COMMIT THEM: See note 51 Am. Dec. 90, for discussion of these points *in extenso*.

CONCURRENCE OF SEVERAL MEMBERS. — Common design is necessary, since, in the absence of proof of a common design, there can be no conviction for the act of mere associate: *State* v. *Trice*, 88 N. C. 627. But it is a conspiracy, and punishable by law, for several persons to persuade a maiden lady, her father and mother, that a forged license is genuine, and that one of their number is a justice of the peace, and thus gain the consent of such father, mother, and daughter to the marriage of the latter: *State* v. *Murphy*, 6 Ala. 765; 41 Am. Dec. 79.

INFLUENCE UPON SOCIETY OF THE ACT DONE A DETERMINING FACTOR IN THE CRIME. — The influence which the act, if done, would have upon society determines whether it is a criminal conspiracy to combine to accomplish such act. The inquiry is not confined to the question whether the act itself might subject the offender to punishment, since criminal conspiracy may exist where the act contemplated is not itself criminally punishable: *Smith* v. *People*, 25 Ill. 17; 76 Am. Dec. 780.

PRIOR AGREEMENT. — A previous concert to effect the unlawful purpose is necessary, or there is no conspiracy: *Regina* v. *Absolon*, 1 Fost. & F. 493.

There must be some agreement, — a union or concert of two or more minds in a thing done or to be done, — and the assent must be real, and not feigned: *Woodworth* v. *State*, 20 Tex. App. 375. Although two parties may coincide in intent, and yet neither combine or confederate: *State* v. *Nauert*, 2 Mo. App. 295; and see 4 Lawson's Criminal Defenses, ed. 1887, p. 616, sec. 217. And the mere fact that two or more parties may have acted together in the commission of the offense is no evidence of a previous conspiracy. "It would be a doctrine fraught with mischievous results, if the mere proof of an actual commission of a criminal act by two or more parties was sufficient in itself to justify the conclusion that a conspiracy had been formed a week or a month before": *Loggins* v. *State*, 8 Tex. App. 434, 442.

ACTUAL AGREEMENT NOT REQUIRED. — AGREEMENT MAY BE EITHER EXPRESS OR IMPLIED. Although a previous concert is essential, and some agreement is required, yet it is not necessary to show a coming together of the defendants, and that they actually agreed upon a common purpose, and the manner of carrying it out. It is only requisite to prove that their acts were done with a view to accomplish the same purpose, and that frequently the same means were employed, part being done by one person and part by another for the purpose of completing the purpose intended so as to effect the same result. This being shown, a jury will be warranted in the conclusion that there was a conspiracy to attain that result: *The Mussell Slough Case* (*United States* v. *Doyle*), 6 Saw. 612, 618; *United States* v. *Rindskopf*, 6 Biss. 259. Nor need the agreement be between all the parties to do the unlawful act. It is sufficient if they all had the same illegal purpose — the same common design — in view, and that each acted a certain part, which might accomplish, or tend to its accomplishment: Id. This doctrine is well stated in the case of *United States* v. *Babcock*, 3 Dill. 582, 585. The court there says: "It is not necessary, to constitute a conspiracy, that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the the unlawful scheme was to be, and the details of the plan or means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design." And see *United States* v. *Goldberg*, 7 Biss. 175; 4 Lawson's Criminal Defenses, ed. 1887, 565.

Sufficiency of Evidence in Such Cases. — If several persons take several steps, all tending towards one obvious purpose, it is for the jury to say whether those persons had not combined together to bring about that end which their conduct so obviously appears adapted to effectuate: *Regina* v. *Duffield*, 5 Cox C. C. 404.

MUST BE MORE THAN ONE PARTY — ACTIVE PARTICIPATION OF SOME KIND NECESSARY. — "To authorize a conviction for conspiracy, there must be proved to have been more than one person guilty, and it needs something more than proof of mere passive cognizance of fraudulent or illegal action of others to sustain conspiracy. There must be something showing active participation of some kind by the parties charged": 2 Wharton's Crim. Law, 7th ed., secs. 23, 55, cited in *Evans* v. *People*, 90 Ill. 384; 4 Lawson's Criminal Defenses, 524, 529. So a husband and wife alone cannot commit a conspiracy: 3 Lawson's Criminal Defenses, ed. 1887, 86; *Commonwealth* v. *Woods*, 7 Boston Law Rep. 58.

PARTY MAY BE GUILTY THOUGH NOT IN AT INCEPTION. — The time when one entered into a conspiracy does not make any difference as to his re-

sponsibility for acts done to carry out the common purpose: *Avery* v. *State*, 10 Tex. Ct. App. Crim. Cas. 199, 212; *United States* v. *Babcock*, 3 Dill. 586; *Cox* v. *State*, 8 Tex. App. 254, 300; *United States* v. *Sacia*, 2 Fed. Rep. 754. The rule being that a new party to a previously formed conspiracy becomes a fellow-conspirator from the moment he agrees to become a party to the unlawful transaction, or does any act in furtherance of the original design: *People* v. *Mather*, 4 Wend. 229; 21 Am. Dec. 122; and this rule has been held to apply to all acts perpetrated as well before as afterwards: *United States* v. *Sacia*, 2 Fed. Rep. 754; *Cox* v. *State*, 8 Tex. App. 254, 300; and this was declared in the last case to be so whether the parties be indicted and tried separately or jointly. But in *State* v. *Duncan*, 64 Mo. 266, it was decided that the mere fact that a party joins a band of persons for an unlawful purpose, such as horse-stealing, does not render him liable for acts done by the others prior to his becoming a member, it not appearing that he received any part of the stolen property or its proceeds: *State* v. *Duncan*, 64 Mo. 266; and see 4 Lawson's Criminal Defenses, ed. 1887, p. 616, sec. 218.

Same Conspiracy although New Parties are Added.— The addition of new parties after a conspiracy is formed does not necessarily destroy the identity of the conspiracy, but it continues as the same conspiracy: *United States* v. *Nunnemacher*, 7 Biss. 111.

NOT ACTUALLY PRESENT AT CONSUMMATION — CONSTRUCTIVE PRESENCE. — Although the rule is, that if the accused was present and committed the crime with his own hands, or abetted and aided another in its consummation, he is deemed to expressly assent thereto (*Lamb* v. *People*, 96 Ill. 73, 82), yet the presence necessary to constitute one a principal in a felony may be constructive, as where he acts with another in pursuance of a common design, and is so situated as to be able to render aid to his confederates with a view to insure the success of the common purpose: *McCarney* v. *People*, 83 N. Y. 408.

WHETHER MEANS USED MUST EFFECT INTENDED DESIGN. — In a charge for conspiracy to cheat and defraud, the offense is not complete, although there may have been an intention to defraud, if the means used could not possibly have that effect: *March* v. *People*, 7 Barb. 391; 4 Lawson's Criminal Defenses, ed. 1887, 530.

SPECIFIC MALICE — ORIGINAL DESIGN NOT CARRIED OUT — GUILT OF ONE, GUILT OF ALL — RESULT DIFFERENT FROM THAT INTENDED — CONSTRUCTIVE GUILT. — The rule is, that each conspirator "is responsible for everything done by his confederates which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. In other words, the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of or foreign to the common design": *Bowers* v. *State*, 24 Tex. App. 542, 550; *State* v. *Myers*, 19 Iowa, 517; *Cox* v. *State*, 8 Tex. App. 254; *United States* v. *Doyle*, 6 Saw. 612; *Phillips* v. *State*, 6 Tex. App. 364; *United States* v. *Butler*, 1 Hughes, 457; *United States* v. *Nunnemacher*, 7 Biss. 111; *Hanna* v. *People*, 86 Ill. 243; *Stevenson* v. *State*, 17 Tex. App. 618; *Miller* v. *State*, 25 Wis. 384; *Breese* v. *State*, 12 Ohio St. 146; 80 Am. Dec. 340; *Moody* v. *State*, 6 Cold. 299; *Williams* v. *State*, 47 Ind. 568; *People* v. *Woody*, 45 Cal. 289; *Williams* v. *People*, 54 Ill. 478; *Regina* v. *Howell*, 9 Car. & P. 437; *Commonwealth* v. *Campbell*, 7 Allen, 541; *Green* v. *State*, 13 Mo. 382; *Tompkins* v. *State*, 17 Ga. 356; *State*

v. *Larkin*, 49 N. H. 39; *Heine* v. *Commonwealth*, 91 Pa. St. 148; and see 4 Lawson's Criminal Defenses, ed. 1887, p. 616, sec. 218.

The principle which makes the acts and declarations of one those of all is, that, by the conspiring together, the parties so confederating jointly assume to themselves the attribute of individuality, so far as the prosecution of the common design is concerned, the principle of identity being the same as that which governs in case of an agent's acts or admissions against his principal: *Ford* v. *State*, 112 Ind. 373, 382. Therefore a person may be guilty of murder, although he neither took part in the killing, nor assented to any arrangement having for its object the death of the person killed; as, where several parties conspire together to do an unlawful act in pursuance of the common purpose and design, and death results to another, all are equally guilty: *Brennan* v. *People*, 15 Ill. 511, 516. So "if two or more persons conspire together to do an unlawful act, and in the prosecution of the design an individual is killed or death ensue, it is murder in all who enter into or take part in the execution of the design. If the unlawful act be a felony, or be more than a mere trespass, it will be murder in all, although the death happened collaterally or beside the original design: *State* v. *Shelledy*, 8 Iowa, 477, 505. And in case of such confederacy to do an unlawful act, if one of the conspirators commits the attempt in pursuance of the original purpose, and the other aids and abets him, although the latter does no positive act, all are guilty; as, where two persons combine to steal, and one only perpetrates the act, the other merely abetting and aiding, both are guilty: *State* v. *Wilson*, 30 Conn. 500. So if several persons conspire to invade a man's household, and go there armed with deadly weapons for the purpose of attacking and beating him, and in furtherance of this common design one of them gets into difficulty with him and kills him, the others being present or near at hand, the latter are guilty of murder, although they did not intend to kill: *Williams* v. *State*, 81 Ala. 1; 60 Am. Rep. 133. So where the intent of the conspirators is to do an unlawful act, as to beat or rob another, and it happens that in pursuance of the common design that other is killed, all are guilty, — the act of one of them, done in furtherance of the common design, is the act of all. It does not lessen the guilt of any one of the conspirators, under such circumstances, that he took no part in the killing, nor assented to any arrangement to compass the death of another: *Brennan* v. *People*, *supra*. And it is held that all are principals who are present at the commission of a crime, as in case of murder, although only one committed the crime, provided it is proven that such killing was done in furtherance of a common design, and is the result of a confederacy for that purpose: *Green* v. *State*, 13 Mo. 382. So if one is present aiding and abetting in the purpose for which he and others were there, and the felony committed was in pursuance of or an incidental probable consequence of such purpose, he is guilty: *Weston* v. *Commonwealth*, 111 Pa. St. 251. In *Frank* v. *State*, 27 Ala., N. S., 37, 43, this doctrine is seemingly not applied to the full extent that the above cases would indicate, being there limited to cases where the object of the conspiracy is an act *malum in se*. And so in *Regina* v. *Skeet*, 4 Fost. & F. 931, it is held that where persons are engaged in a common purpose, in the course of carrying out which an act of homicide occurs, the doctrine of constructive guilt, regarding those not actually present at or parties to the crime perpetrated, only applies where the common purpose is felonious, not where it is merely unlawful, as in case of a misdemeanor, unless it appears that there was a common intent to effect the purpose contemplated at all hazards. A similar rule is given in *Lamb* v. *People*, 96 Ill. 73, 84, where it is said that if "the unlawful act agreed to be

done is not of a dangerous or homicidal character, and its accomplishment does not necessarily or probably require the use of force or violence, which may result in the taking of life unlawfully, no such criminal liability will attach merely from having been a party to such an agreement." But the responsibility only attaches to the actual perpetrators, however, when an offense is committed by one or more of them from causes unconnected with the common object, and the question is for the jury whether the act done was in furtherance of the common purpose, or independent of it, and without any previous concert: *Frank* v. *State*, *supra*. So where parties conspired together to commit an offense, and while engaged in the perpetration of the original wrong, attempted to escape, and some other parties, without the knowledge or consent of the defendant, committed homicide, it was held that he was not responsible, since "there can be no criminal responsibility for anything not fairly within the common enterprise, and which might be expected to happen if occasion should arise for any one to do it. In other words, the principle is quite analogous to that of agency, where the liability is measured by the express or implied authority. And the authorities are quite clear and reasonable which deny any liability for acts done in escaping, which were not within any joint purpose or combination": *People* v. *Knapp*, 26 Mich. 112, 115. And where several persons attack another, and leave him senseless on the ground, and one of them returns and steals his money, he only can be convicted of robbery, since such act was not done in furtherance of the common design: *Rex* v. *Hawkins*, 3 Car. & P. 392. So persons who attend one on a lawful expedition, during which he alone commits a crime, are liable therefor only on proof of a conspiracy, or of their intention to aid him in doing any unlawful act he might do: *Hairston* v. *State*, 54 Miss. 689; 28 Am. Rep. 392. Again, if A and B, in furtherance of a prearranged plan, attack C, and D, without being privy to the common design, enters into the fight, and C dies from the wounds inflicted by A and B in the assault, D is not guilty of murder: *Frank* v. *State*, *supra*.

NO PARTICULAR OR WELL-DEFINED PURPOSE IN VIEW. — Where parties combine together for a general unlawful purpose, as "to resist all opposers in the commission of any breach of the peace," and for that purpose assemble together and arm themselves, thus intending to resist the lawfully constituted authorities of the country, they are all answerable for anything done in the execution of it, and it is no defense that the parties had no well-defined or particular mischief in view as the result of their combination: *Regina* v. *Tyler*, 8 Car. & P. 616.

PARTIES ARE PRESUMED TO HAVE UNDERSTOOD THE CONSEQUENCES REASONABLY EXPECTED TO RESULT FROM THE CONSPIRACY. — The words of the court, in *People* v. *Brown*, 59 Cal. 345, are in point. It is there said that "where men confederate together to commit crimes of a nature, or under such circumstances, as will, when tested by human experience, probably result in taking human life, if such necessity should arise to thwart them in the execution of their unlawful plans, it must be presumed that they all understand the consequences which might reasonably be expected to flow from carrying into effect their unlawful combination, and to have assented to taking human life, if necessary to accomplish the objects of the conspiracy." But the law goes no further upon the doctrine of implied assent: *Brennan* v. *People*, 96 Ill. 73, 82.

KNOWLEDGE BY A MEMBER OF THE PART TO BE PERFORMED BY HIM. — It if not necessary that any but the leading conspirator had knowledge of the exact part another was to perform: *United States* v. *Rindskopf*, 6 Biss. 259.

PREVIOUS ACQUAINTANCE. — It is a conspiracy if the parties concur in doing the act, although they were not previously acquainted with one another: *People* v. *Mather*, 4 Wend. 229; 21 Am. Dec. 122.

MEETING TOGETHER OF THE PARTIES. — It is not necessary to prove that all the parties met together: *Rex* v. *Reed*, 6 Cox, 134; 4 Lawson's Criminal Defenses, ed. 1887, 621, 623.

THE PARTICULAR MEANS TO BE EMPLOYED. — A conspiracy may be indictable even where the parties have not settled upon the means to be employed: *King* v. *Gill*, 2 Barn. & Ald. 204, 206.

THE PARTICULAR MANNER NOT MATERIAL. — The particular manner in which the conspiracy is to be or has been carried out is not material: *United States* v. *Rindskopf*, 6 Biss. 259.

PARTICULAR PERSON DOING ACT — IDENTITY OF. — If it appears that the felony committed was done in pursuance of a common design entered into by all, each one may be found guilty, although there is doubt as to the identity of the particular defendant who perpetrated the crime charged: *Nevill* v. *State*, 60 Ind. 308. So it is held in *Ritzman* v. *People*, 110 Ill. 362, 369, that a conviction may be had although the evidence does not show beyond a reasonable doubt the very hand that committed the felony.

INDICTMENT. — *General Averments.* — The rule given in the United States courts is, that an indictment "must inform the defendant of the nature and cause of the accusation," and must set forth the offense with clearness and certainty, and "every ingredient of which the offense is composed must be accurately and clearly alleged." The court, in this case, disapproves the former English practice, whereby indictments for conspiracy were sustained which were framed in the most general manner without alleging any overt acts, and denies that such doctrine exists in the American courts. The case of *United States* v. *Cruikshank*, 92 U. S. 542, is relied on, and the opinion is cited from upon this point as follows: "The accused has therefore the right to have a specification of the charge against him, in order that he may decide whether he should present his defense by motion to quash, demurrer, or plea, and the court, that it may determine whether the facts will sustain the indictment," and approves the decisions in Maine, Massachusetts, Michigan, New Hampshire, Pennsylvania, and Vermont, "which reject the authority and soundness of the English decisions sustaining the sufficiency of vague and general counts in indictments for conspiracy": *United States* v. *Walsh*, 5 Dill. 58; 4 Lawson's Criminal Defenses, ed. 1887, 561, 562, citing *State* v. *Roberts*, 34 Me. 320; *Alderman* v. *People*, 4 Mich. 414; 69 Am. Dec. 321; *State* v. *Parker*, 43 N. H. 83; *State* v. *Keach*, 40 Vt. 118; *Commonwealth* v. *Hunt*, 4 Met. 111; 38 Am. Dec. 347; 4 Lawson's Criminal Defenses, ed. 1887, 537; *Commonwealth* v. *Eastman*, 1 Cush. 189; *Commonwealth* v. *Hartman*, 5 Pa. St. 60; and see opinion *in extenso* for a discussion of this question. But in *People* v. *Richards*, 1 Mich. 216, 51 Am. Dec. 75, it is decided that a general charge of conspiracy in an indictment stating the object and intent is sufficient.

Overt Acts. — In general, an overt act in pursuance of a conspiracy need not be alleged, and if such unnecessary averment be made, it does not aid a defective charge of conspiracy: *People* v. *Arnold*, 46 Mich. 268, 273; *Alderman* v. *People*, 4 Id. 414; 69 Am. Dec. 321; although "in indictments for the common-law offense of conspiracy it is usual to state the conspiracy, and then show that in pursuance of it certain overt acts were done"; but a variance in the time of committing such overt acts is not fatal: *United States* v. *Graff*, 14 Blatchf. 381, 392. And in *People* v. *Richards*, 1 Mich. 216, 51 Am.

Dec. 75, it is said that an indictment for conspiracy usually sets out overt acts, such as may have been done by any one or more of the conspirators in order to effect the common purpose of the conspiracy, but this is not essentially necessary. The reason of the general rule is this, the unlawful agreement is the gist of the offense; and a conspiracy to accomplish an unlawful purpose is perfect from the time the unlawful agreement is made out; no overt act is required to complete the crime; it is therefore unnecessary to charge the execution of such agreement. The execution is merely proof of the intent, or an aggravation of the criminality of the unlawful combination: *Commonwealth* v. *Hunt*, 4 Met. 111; 38 Am. Dec. 347, and note 361; *People* v. *Mather*, 4 Wend. 229; 21 Am. Dec. 122; *State* v. *Wilson*, 30 Conn. 500, 507; *Alderman* v. *People*, 4 Mich. 414; 69 Am. Dec. 321; *State* v. *Ripley*, 31 Me. 386; *Hazen* v. *Commonwealth*, 23 Pa. St. 355, 363; *State* v. *Rickey*, 9 N. J. L. 293; *Isaacs* v. *State*, 48 Miss. 234; *United States* v. *Hirsch*, 100 U. S. 33; and see note to 51 Am. Dec. 82.

Imperfect Averment, when not Aided. — An imperfect averment in the indictment, of facts constituting a description of the offense, is not aided by the introductory matter therein, nor by the qualifying epithets attached to the facts, nor by the alleged injurious consequences of such facts: *Commonwealth* v. *Hunt*, 4 Met. 111; 38 Am. Dec. 347.

When It is Necessary to Set out the Means by Which Object is to be Accomplished. — An indictment charging a conspiracy to do a lawful act by criminal means must particularly set forth the means; but where the charge is a conspiracy to do an act in itself unlawful, either at common law or by statute, the means need not be specifically stated: *State* v. *Crowley*, 41 Wis. 271; 22 Am. Rep. 719.

The words of the court in *State* v. *Ripley*, 31 Me. 386, 389, well state the rule and the reason therefor. They are as follows: "In an indictment for a conspiracy at the common law, if the conspiracy charged is an unlawful combination and agreement of two or more persons to commit a deed which, if done, would be an offense well known and acknowledged, the nature of which is perfectly understood by the name by which it is designated, no further description of the crime is required. It is equally unnecessary to set out the means by which the unlawful act was intended to be accomplished. It is only when the conspiracy is to promote a purpose not criminal or unlawful in itself, but when that purpose is to be effected by means which are criminal or unlawful, that those means should be specifically stated in the indictment. The reason for this distinction is very obvious. If the conspiracy is to do an act which, if done, would be criminal, the offense is perfect without reference to the means to be used, and it is unnecessary that this criminal pupose should be so specifically alleged as to be well understood. If the conspiracy consists in the unlawful means to be employed, according to well-established rules of pleading, those means which are relied upon as giving the wrongful agreement a criminal character should be specifically stated, although not the object of the combination, but merely the instrument promotive of it." And again, it is declared by the court in *Hazen* v. *Commonwealth*, 23 Pa. St. 353, 363, that, "in an indictment for a conspiracy to do an act prohibited by the common law, where the act has a specific name which indicates its criminality, it is not necessary to describe it minutely. But it has been thought that, where the object of the conspiracy is merely forbidden by the statute, it can be described only by its particular features. . . . . But even in offenses of this character, it has never been held necessary to set forth the unlawful object with the precision required in an indictment for

perpetrating it. It is the conspiracy, and not the object sought to be accomplished by it, that is the subject of indictment. Where the indictment is for an act done, it is always in the power of the prosecutor to lay it with certainty; and this the accused has a right to require, as well for the purposes of his defense as for his protection against a second prosecution for the same cause. But this reason does not extend to an object which may never have been accomplished, and which is not the gist of the offense charged, although an essential ingredient in it": *People* v. *Richards*, 1 Mich. 216; 51 Am. Dec. 75; *State* v. *Noyes*, 25 Vt. 415, 422; *People* v. *Arnold*, 46 Mich. 268, 271; *Commonwealth* v. *Hunt*, 4 Met. 111; 38 Am. Dec. 347; 4 Lawson's Criminal Defenses, ed. 1887, 537; *State* v. *Stewart*, 59 Vt. 27; 59 Am. Rep. 710; *State* v. *Potter*, 28 Iowa, 554. So the particular means intended to be used to effect the alleged fraud must be averred in an indictment for a conspiracy to cheat and defraud: *March* v. *People*, 7 Barb. 391; 4 Lawson's Criminal Defenses, ed. 1887, 530.

Agreement or Combination must be Averred in an indictment for conspiracy: *People* v. *Richards*, 1 Mich. 216; 51 Am. Dec. 75.

Defendant's Guilty Knowledge need not be Set Forth in the indictment: *State* v. *Stewart*, 59 Vt. 273; 59 Am. Rep. 710.

Where the Act is Consummated, greater particularity is required in setting out a conspiracy than where it is not executed: *Brown* v. *State*, 2 Tex. App. 115. So where the charge is of obtaining money by false pretenses, such act being consummated, the person against whom the conspiracy was directed should be stated, and it should also appear in the information, by way of averment, that the property belonged to some person or persons other than those engaged in the conspiracy: *People* v. *Arnold*, 46 Mich. 268.

Whether Indictment may be Laid against One Conspirator. — It is held, in *People* v. *Richards*, 67 Cal. 412, 56 Am. Rep. 716, where all the leading authorities on this point are reviewed, that an information for conspiracy may be laid against one conspirator separately. In a writ of conspiracy, however, it was necessary by the common law that two defendants at least be joined: *Jones* v. *Baker*, 7 Cow. 445.

Venue, where Laid. — Offense, where Punishable. — The venue in an indictment for conspiracy may be laid in the county in which the agreement was entered into, or in any county in which an overt act was done by any of the conspirators in furtherance of their common design. Hence if a conspiracy be formed at sea, the venue may be laid in any county in which an overt act was committed by one of the conspirators on land: *People* v. *Mather*, 4 Wend. 229; 21 Am. Dec. 122; and a conspirator may be tried and convicted in the place where the overt act is done, in pursuance of such conspiracy: *Commonwealth* v. *Gillespie*, 7 Serg. & R. 469; 10 Am. Dec. 475; *United States* v. *Rindskopf*, 6 Biss. 259. It being held that the fact that the operations take place in various states, as the necessities of the conspirators may require, does not affect the jurisdiction of the state in which any or all of them reside, since "otherwise the offense would be committed with impunity": *Bloomer* v. *State*, 48 Md. 521. So where a conspiracy to forge title to land in Texas was formed in Texas, and one or more overt acts were committed there, but the actual forgery was committed in another state by an agent or co-conspirator, the courts of Texas have jurisdiction over the offense: *Ex parte Rogers*, 10 Tex. App. 655; 38 Am. Rep. 654.

EVIDENCE, DIRECT PROOF NOT REQUIRED. — Combinations and conspiracies are not required to be established by direct evidence of the acts charged, but may and generally must be proven by a number of indefinite circumstances,

which vary according to the objects to be accomplished. This is illustrated by the following case: Certain parties were indicted for a conspiracy to defraud the Chicago, Burlington, and Quincy Railroad Company, by fraudulently filling out blank cards and tickets of the railroad company, which were in their possession, with the names of divers persons, and by fraudulently and wrongfully procuring and filling out blank cards, tickets, and passes of the property of the company with the names of persons, with intent to cheat and defraud the company. The prosecution offered in evidence three Burlington and Missouri River railroad passes found in the possession of the defendants, and which were of a similar kind and character as those of the Chicago, Burlington, and Quincy railroad. This fact was offered, in connection with other evidence previously submitted, for the purpose of establishing the fraudulent intent of the defendants in respect to the conspiracy charged in the indictment. The prosecution also offered evidence of other acts of some of the conspirators in regard to filling in the passes and tickets, and the sale and purchase of them, also of dealings had in regard to them, some of the said acts having been done in Philadelphia and Camden, and the court held that these various facts tended to prove a "common design, concert of action, and co-operation between the parties concerned in unlawfully and collusively dealing with the property" in question: *Bloomer* v. *State*, 48 Md. 521; and see *Jones* v. *Baker*, 7 Cow. 445; *Bottomly* v. *United States*, 1 Story, 135, 143; *The Mussell Slough Case* (*United States* v. *Doyle*), 6 Saw. 612; *United States* v. *Babcock*, 3 Dill. 586; *United States* v. *Goldbery*, 7 Biss. 175; 4 Lawson's Criminal Defenses, ed. 1887, 565; *State* v. *Sterling*, 34 Iowa, 443. So separate and distinct acts and statements of the several conspirators looking towards the carrying out of the common design, and done for that purpose, may be shown to establish the conspiracy: *People* v. *Arnold*, 46 Mich. 268, 277; *United States* v. *Nunnemacher*, 7 Biss. 111; *United States* v. *Rindskopf*, 6 Biss. 259.

SAME — PRESUMPTIONS. — That a person conspired with others to commit a murder which was perpetrated thereafter does not of itself warrant the legal presumption of his having aided, but is to be weighed as evidence tending to prove such fact. But if such conspirator was in a situation to have aided the actual murderer at the time the felony was committed, then the legal presumption follows that he was there to carry into effect the concerted crime, and the burden is upon him to rebut the presumption by showing that the purpose for which he was in such place was totally unconnected with the conspiracy: *Commonwealth* v. *Knapp*, 9 Pick. 495. So in case conspiracy is charged against a public officer in the discharge of the duties of his office, there is a presumption of innocence in his favor, which must prevail against circumstances of suspicion, but proof of other prior delinquencies of a like nature, especially transactions between himself and the same parties, may overcome such presumption: *Bottomly* v. *United States*, 1 Story, 135.

OVERT ACT NEED NOT BE PROVEN. — Since the offense is complete, as a rule, when the unlawful agreement is established, or it is shown that the conspiracy was formed: Note 51 Am. Dec. 82; *State* v. *Ripley*, 31 Me. 386; *Hazen* v. *Commonwealth*, 23 Pa. St. 355, 363; *State* v. *Rickey*, 9 N. J. L. 293; *Isaacs* v. *State*, 48 Miss. 234; but see *State* v. *Norton*, 23 N. J. L. 33, which was a statutory case. But an overt act, criminal in itself, may be shown to prove the existence of the conspiracy: *United States* v. *Rindskopf*, 6 Biss. 259.

THE OBJECT OF A CONSPIRACY MUST BE PROVEN as laid in the indictment: *Evans* v. *People*, 90 Ill. 384; 4 Lawson's Criminal Defenses, 524, 528. So "an averment on an indictment for conspiracy, that the defendants conspired to defraud A, is not supported by proof that they conspired to defraud the public

generally, or any individual whom they might meet and be able to defraud": Id. 528. And the conspiracy itself must be proven by the prosecution as alleged, "by clear and satisfactory evidence." The accused must be guilty of the offense as charged, or a conviction cannot be sustained: Id. 530.

PROOF AS TO TIME WHEN CONSPIRACY WAS FORMED. — It is held in *United States* v. *Goldberg*, 7 Biss. 175, that it is not essential that the conspiracy be proven to have been formed at the precise time stated in the indictment. It is sufficient to show that at or about the times charged there was a conspiracy to effect the purpose stated.

SIMILAR CRIMES — HOW FAR EVIDENCE. — In the case of *Card* v. *State*, 109 Ind. 415, it was decided that where the act with which the accused is charged is simply one of a system of similar crimes committed in pursuance of a conspiracy, evidence of the perpetration of such like crimes is admissible. And see *Bottomly* v. *United States*, 1 Story, 135.

LETTERS AND TELEGRAMS — WRITTEN DOCUMENTS, WHEN ADMISSIBLE. — In the trial of Thomas Hardy for high treason (24 Howell's State Trials, 199), — a leading case, — the prosecution offered in evidence a letter containing an account of certain songs sung at a meeting of the conspirators. The songs were of a treasonable or seditious character, and the letter in question was written by one of the conspirators to a third party, and the court rejected the evidence. But thereafter, when a question arose as to the admissibility of another letter written by one of the conspirators to another, but which was not proven to have come into the hands of the person to whom it was written, the court said: "On the last question before the court (the admissibility of the letter containing an account of the songs), I confined what I said to the exact circumstances of the case, namely, that the bare relation of acts by one of several persons to whom the conspiracy is imputed, to a perfect stranger to that conspiracy is no more than an admission which may possibly affect himself, but cannot possibly affect any of his co-conspirators, it not being an act done in the prosecution of that conspiracy. But I confess there appears to me to be a material distinction in this case. This is a paper which is addressed by one of several conspirators to another of those conspirators; it is introduced as subservient to the proof of the general nature and tendency of that conspiracy which is alleged and endeavored to be proved as the foundation of affecting the prisoner with a share in that conspiracy. Now, it seems to me that one conspirator addressing a paper to another conspirator having relation to that conspiracy (not merely a bare description to a stranger), that one of them addressing that paper to the other is an act complete in that single conspirator, although that paper should be intercepted, or although it should never reach that person for whose perusal it was intended; that distinguishes this from the other case; it is a different act in one, though it does not reach the other in that sense; it is an act by one of the conspirators, which, in order to show the nature and tendency of that conspiracy, may be read as against any other:" Id. 475.

In the following case it was proven that the accused associated with another in planning a theft and in learning the situation of the premises and the ways of the keeper of them. Evidence was then offered that the one who was in fact engaged in the taking of the property sent the porter of the warehouse to the keeper's home with a letter, and promised to reward him after the delivery of the letter, upon his calling at a certain street and number. While the porter was upon that street and looking for the number, he met and conversed with the prisoner in regard to the whereabouts of the keeper. It did not appear that the accused was otherwise present at the

warehouse from which the property was taken, nor that he was in close vicinity to it. It was held that the letter was properly admitted, and that the evidence was enough, in connection with proof of his confederacy and prior aid, to go to the jury upon the question of the participation of the accused in the theft charged: *McCarney* v. *People*, 83 N. Y. 408, 413. So a letter written by one conspirator to another, in furtherance of a common design to kill a third person, and which letter shows malice and ill will on the part of the writer against such person, is admissible against all engaged in such conspiracy: *Stewart* v. *State*, 26 Ala. 44; and in *United States* v. *Babcock*, 3 Dill. 582, it was decided that the fact appearing that letters had been sent by one conspirator to another, the jury might consider the fact as a circumstance that an actual correspondence about some undisclosed matter had taken place, also the time and manner of its occurrence, but they might not conjecture as to what the contents of the letters were.

The rule as to the admissibility of letters in evidence has been extended by the court in *Rex* v. *White*, 1 Car. & P. 67, in favor of the accused, since it is there determined that, under certain circumstances, letters written by one of the defendants to another are admissible in his behalf, for the purpose of showing that he was merely a dupe of the other, and that he did not himself participate in the acts charged. A telegram, however, from the wife of one of the defendants in an action for conspiracy, not written nor sent to either of them, is inadmissible as evidence against them: *Benford* v. *Sanner*, 40 Pa St. 9; 80 Am. Dec. 545. But the contents of any written document are evidence against the person whose name appears therein, he having assented to its publication: *Regina* v. *Rowlands*, 5 Cox C. C. 436.

EVIDENCE OF SPEECHES, WHEN ADMISSIBLE. — Where an indictment was brought against several parties for entering into a conspiracy to prevent the use of the English language in a certain church, and it was proven that they were unlawfully combined for such purpose, and held meetings to further such object, the court admitted as evidence against all, the speeches and inflammatory language used by a few: *Commonwealth* v. *Eberle*, 3 Serg. & R. 7, 16. But such words are not conclusive evidence against the others: Id. 16. And in order that the speech of a third party at a meeting may be admissible against other persons charged with conspiracy, but who were not present at the meeting, it must be proven that such third party was acting as the defendant's agent, or that he was co-operating at that time as a co-conspirator with the defendants, and engaged in one common design with them: *Regina* v. *Duffield*, 5 Cox C. C. 404.

SAME — "PERSONALS" IN NEWSPAPERS. — After proof of a conspiracy between defendant and others to rob banks, and of a meeting of such conspirators after a robbery, evidence that the conspirators had previously arranged for calling such meetings, and for warning each other of danger, by "personals" in a newspaper, the advertisements themselves so inserted, and the newspaper containing them, are admissible, whether the defendant saw one of the "personals" or not: *Commonwealth* v. *Scott*, 123 Mass. 222; 25 Am. Rep. 81.

SAME — INSCRIPTIONS AND DEVICES ON BANNERS AND FLAGS. — Parol evidence may be given of inscriptions and devices on flags or banners displayed at a meeting; nor is it necessary to produce the originals; and it would also seem that notice to the defendants to produce them is not required, such evidence being properly admissible to show the general character and intention of the assembly: *King* v. *Hunt*, 3 Barn. & Ald. 566, 574, 576.

SAME — PRINTED PLACARDS AND PUBLICATIONS. — Where a printed placard in a window announced certain acts done by several parties, who saw the placard, and allowed it to remain there, it was held that the entire contents of such placard were admissible against them as evidence of the recognition by them of such contents: *Regina* v. *Rowlands*, 5 Cox C. C. 436. So where the secretary of an association sees in the window of a public-house a printed placard purporting to be signed by him as such secretary, and he permits it to remain there, its contents are admissible in evidence against such secretary: Id. And it is proper evidence to go to the jury, in proof of the fact that such parties saw and recognized the publication, that they were seen going in and out of the house, and near by the window where the placard was: Id.

SAME — CONTENTS OF HANDBILLS. — Where a handbill declares that certain persons will do certain things, and such handbill is circulated in places where, by every reasonable presumption, the conclusion would be warranted that those persons saw it, and to this is added the fact that the identical thing is done by them which the handbill indicated they would do, the contents of such handbill are proper evidence against them; but as against persons not expressly named in such handbill, its contents are not admissible to affect them when merely declaratory of the intentions of certain parties, although there is evidence from which the inference may properly be drawn that they assisted in effecting the purposes indicated, and that they co-operated with the party whose name is signed to the bill, such evidence of a connection stopping short of proof of agency, or of a conspiracy then existing between all the parties: *Regina* v. *Duffield*, 5 Cox C. C. 404.

SAME — MEETINGS TO EXCITE DISCONTENT AGAINST GOVERNMENT — RESOLUTIONS PASSED AT PRIOR MEETING. — Where several persons were indicted upon a charge of unlawfully meeting together with persons unknown for the purpose of exciting discontent and disaffection against the government and constitution, and it appeared that A had presided at the meeting, it was held, for the purpose of showing A's intention in assembling and attending this meeting, that evidence was admissible of the resolutions passed at a former meeting, likewise presided over by A, and which was held at a distant place shortly before, the avowed purpose of such meeting being that of the meeting mentioned in the indictment; and it was also held that a copy of such resolutions which A had given another as those intended to be proposed, and which were like those heard read by the witness in the meeting, was sufficient, and that the original need not be produced: *King* v. *Hunt*, 3 Barn. & Ald. 566.

SAME — MEETINGS — COMPLAINTS MADE TO POLICE. — And where the indictment was for a conspiracy to procure a large number of persons to assemble for the purpose of exciting terror in the people and discontent against the government, and evidence having been given of several meetings, at which the defendants were present, it was held that it might be shown by the superintendent of police that persons had complained to him of being alarmed by those meetings, and that it was not necessary to call the persons who made the complaints: *Regina* v. *Vincent*, 9 Car. & P. 275.

SAME — ASSEMBLING AND DRILLING MEN. — Where a meeting was alleged to have been assembled for the purpose of creating disaffection and discontent against the government, and to which large bodies of organized men had gathered from a distance, marching thither with a regularity of step and movement resembling a military march, it was held that evidence might be given, and was unquestionably competent, for the purpose of showing the intention and gen-

eral character of the assembly, that within a short time prior thereto, and at the very place from which one of these bodies had come, men had assembled before daybreak, and had been seen there drilling and training, and had received instructions to march, and that they had ill treated certain persons who saw them, and had extorted an oath from one of them of disloyalty, and that such person had been hissed by another body of men who passed his house on their way to the meeting: *King* v. *Hunt*, 3 Barn. & Ald. 566. And it was held in that case that evidence of the supposed misconduct of those who dispersed such meeting, and of various claimed acts of outrage committed by them upon those present at the meeting, was inadmissible: Id.

SAME — ACTS AND DECLARATIONS OF CO-CONSIRATORS. — It is well-settled law that, the conspiracy being proven, the acts and declarations of co-conspirators, when a part of the *res gestæ*, and which were done and made after the inception and before the completion of the criminal enterprise, and were in furtherance of the common design, are admissible against all: *Phillips* v. *State*, 6 Tex. App. 364; *Commonwealth* v. *Brown*, 14 Gray, 419, 432; *Caines's Case*, 20 W. Va. 679; *State* v. *Hogan*, 3 La. Ann. 714; *People* v. *Stanley*, 47 Cal. 113, 118; *Tompkins* v. *State*, 17 Ga. 356, 359; *American Fur Company* v. *United States*, 2 Pet. 358; *State* v. *Buchanan*, 35 La. Ann. 89; *Apthorp* v. *Comstock*, 2 Paige, 488; *State* v. *Ford*, 37 La. Ann. 444; *Preston* v. *Bowers*, 13 Ohio St. 1, 13; *Cortez* v. *State*, 24 Tex. App. 511; *McCaskey* v. *Graff*, 23 Pa. St. 321; 62 Am. Dec. 336, and note 340; *State* v. *Larkin*, 49 N. H. 44; *Reid* v. *State*, 20 Ga. 681; *Bloomer* v. *State*, 48 Md. 521, 531; *Clinton* v. *Estes*, 20 Ark. 216; *Jenne* v. *Joselyn*, 41 Vt. 478; *People* v. *Brown*, 59 Cal. 345; *Nevill* v. *State*, 60 Ind. 308, 310; *Card* v. *State*, 109 Id. 415; *State* v. *Nash*, 7 Iowa, 347, 384; *Cox* v. *State*, 8 Tex. App. 254; *State* v. *Hudson*, 50 Iowa, 157; *State* v. *Duncan*, 64 Mo. 262; *Johnson* v. *Miller*, 63 Iowa, 529; *Williams* v. *State*, 24 Tex. App. 17. The conspirator need not be a party defendant to make his acts and declarations binding upon the others. *Preston* v. *Bowers*, 16 Ohio St. 1, 13, and cases *ante*. And it is immaterial whether the declarations were made in the presence of the party or parties against whom the evidence is offered, or that they had any knowledge of them: *Commonwealth* v. *Brown*, 14 Gray, 419; *Nudd* v. *Barrows*, 91 U. S. 426, 436; since if it were made at another time and place in regard to the object of the conspiracy, it is evidence against all: *Rex* v. *Salter*, 5 Esp. 225; *Rex* v. *Hammond*, 2 Id. 719. But declarations and acts made and done by one not on trial before the formation of the conspiracy are inadmissible to bind a confederate: *Ford* v. *State*, 112 Ind. 373; *State* v. *Weaver*, 57 Iowa, 730. And the acts or declarations must not be subsequent to the accomplishment or abandonment of the common design, nor a mere narrative of past events, since in such case they should be rejected: *Benford* v. *Sanner*, 40 Pa. St. 9; 80 Am. Dec. 545; *State* v. *Duncan*, 64 Mo. 262; *State* v. *Pike*, 51 N. H. 105; *State* v. *Jackson*, 29 La. Ann. 354; *State* v. *Buchanan*, 35 Id. 89; *State* v. *Ross*, 29 Mo. 32, 50; *State* v. *Arnold*, 48 Iowa, 566; *Phillips* v. *State*, 6 Tex. App. 364; the rule being that "the declarations of a conspirator are received against his fellows only when they are either in themselves acts, or accompany and explain acts, for which the others are responsible, but not when they are in the nature of narratives, descriptions, or subsequent confessions": *State* v. *Ross*, 29 Mo. 32, 50; *Reid* v. *State*, 20 Ga. 681; *State* v. *Weaver*, 57 Iowa, 730; *Patton* v. *State*, 6 Ohio St. 467; *Cohea* v. *State*, 11 Tex. App. 153; *People* v. *Arnold*, 46 Mich. 268; *Rufer* v. *State*, 25 Ohio St. 464, 475; *Wiggins* v. *Leonard*, 9 Iowa, 194, 199; *Patton* v. *State*, 6 Ohio St. 467; *Clinton* v. *Estes*, 20 Ark. 216; *Hunter*

v. *Commonwealth*, 7 Gratt. 641. This rule is, however, impliedly qualified in Pennsylvania, where it is held that such evidence is not generally admissible after the transaction is closed: *Helser* v. *McGrath*, 58 Pa. St. 458. Although confessions by a co-conspirator made after the consummation of the offense, and not in the presence of the accused, are inadmissible against him, yet such conspirator being a witness, his testimony as to the conspiracy, and as to all matters properly relevant and material to the issue, is admissible, but it is necessary, however, in order to warrant a conviction, that such evidence be corroborated: *Cohea* v. *State*, 11 Tex. App. 153. And acts and declarations made after the commission of the crime charged are admissible to corroborate a confession made before his arrest by a co-conspirator: *State* v. *Knight*, 19 Iowa, 94. So declarations by one, of a common intent is admissible against all, it being shown that they were present at the time such declarations were made: *State* v. *Crowley*, 33 La. Ann. 782. But a declaration by a co-conspirator, of his individual intention to commit a crime, when not made in furtherance of the common design may not be shown, as against an associate who is subsequently indicted for the same criminal act to which such acts and declarations related: *Cox* v. *State*, 8 Tex. App. 254.

EVIDENCE REQUIRED OTHER THAN DECLARATIONS AND ACTS. — It is held in *Wiggins* v. *Leonard*, 9 Iowa, 194, that the conspiracy must be made out by other evidence than that showing the declaration or acts; and to the same effect is the decision in *Ford* v. *State*, 112 Ind. 373, 383, where it is declared that one person cannot be connected with a conspiracy by the declarations of another, declarations not being competent for that purpose.

WHEN ACTS, ETC., ADMISSIBLE IN BEHALF OF ACCUSED. — The rule as to admissions is extended in cases of conspiracy as well in favor of those engaged in unlawful combinations as against them: *Emma Silver M. Co.* v. *Park*, 14 Blatchf. 411. So letters written by one co-conspirator to another may, in certain cases, be admissible in his behalf, to show his non-participation, or that he was merely a dupe: *Rex* v. *White*, 1 Car. & P. 67. And "where an act or transaction is offered in evidence for the purpose of showing the motives or the state of mind of the parties to it, at least as a general rule, the party affected ought to be permitted to show the circumstances which led to it, otherwise the real object of the inquiry may not with certainty be ascertained": *Rufer* v. *State*, 25 Ohio St. 464, 476. But admissions made by a conspirator are not admissible as evidence in favor of his co-conspirator unless part of the *res gestæ*, or in case where it is part of a conversation offered by the prosecution: *Wright* v. *State*, 10 Tex. App. 476.

Cases Showing the Application of Rule as to Acts, etc. — The flight of a person who is suspected of crime, and who is connected with others in a conspiracy, is not a fact admissible in evidence against the others: *People* v. *Stanley*, 47 Cal. 113, 118; nor can declarations be admitted which were made in the absence of the defendant by those not on trial, for the purpose of showing ill-feeling towards the deceased, unless such declarations were made after the conspiracy was formed and before its perpetration, and in furtherance of the common design: *Rufer* v. *State*, 25 Ohio St. 464; since malice and ill feeling toward the deceased on the part of those not on trial can in no event tend to show a conspiracy between them and the defendant to commit the crime: Id.; and in the absence of a combination, declarations are only evidence against the party making them: *Oldham* v. *Bentley*, 6 B. Mon. 428, 431; *State* v. *Poll and Lavinia*, 1 Hawks L. & Eq. 442. But where an unlawful combination is shown, the conversation had by the assaulted party

with one of the defendants, immediately prior to the assault, is admissible: *State* v. *Rawles*, 65 N. C. 334; and see *State* v. *Soper*, 16 Me. 293; 33 Am. Dec. 665. So the financial condition of one of the conspirators, before the acts charged as the object of the conspiracy (being robbery and murder) were consummated, may be shown in connection with his possession of the property of the deceased: *Post* v. *State*, 10 Tex. App. 598. And where, in furtherance of a conspiracy to liberate a prisoner, — he having knowledge of such conspiracy, — a murder is committed, evidence is admissible, on the trial of the conspirators therefor, of the acts of the prisoner in prison, and of the articles found upon him: *Regina* v. *Desmond*, 11 Cox C. C. 146. And on an indictment for burglary of a bank, after proof of a conspiracy between the defendant and others, in pursuance of which the crime was committed, evidence that a director of the bank was taken by one of the conspirators, not the defendant, to see a third conspirator with whom he had negotiations relative to the return of the stolen property, is admissible: *Commonwealth* v. *Scott*, 123 Mass. 222; 25 Am. Rep. 81. So after proof of the conspiracy, it then becomes competent for the prosecution, upon the trial of one of the co-conspirators, to show the malice and ill feeling against the deceased which actuated the others, who were not on trial. This rule, however, was not laid down as a general one, governing in all cases, but the court merely said it would be the law in a proper case: *Rufer* v. *State*, 25 Ohio St. 464. And where one of several conspirators endeavored to get a material witness out of the way, in order that her testimony might not be availed of, evidence of such fact is admissible; nor is such testimony within that class known as subsequent declarations of one conspirator: *Reid* v. *State*, 20 Ga. 681.

ORDER OF PROOF — WHETHER CONSPIRACY SHOULD BE FIRST PROVEN BEFORE EVIDENCE OF ACTS, ETC. — It is held in some cases that evidence of the acts and declarations may not be given until after proof of the conspiracy: *Carskadon's Case*, 7 W. Va. 679; *Caines's Case*, 20 Id. 679; *Burke* v. *Miller*, 7 Cush. 547; *Helser* v. *McGrath*, 58 Pa. St. 458; *Wiggins* v. *Leonard*, 9 Iowa, 194. The general rule may, however, be thus stated: Such acts and declarations of co-conspirators as are otherwise competent and relevant are not admissible against a co-defendant until his connection with the common purpose has been shown *aliunde*: *Benford* v. *Sanner*, 40 Pa. St. 9; 80 Am. Dec. 545; although *prima facie* evidence of the conspiracy is held to be sufficient to warrant the admission in evidence of the declarations: *Caines's Case*, 20 W. Va. 679; *Price* v. *Jones*, 4 Watts, 85; *Phœnix Ins. Co.* v. *Moog*, 78 Ala. 284; *Avery* v. *State*, 10 Tex. App. 199; *Clayton* v. *Anshaving*, 6 Rand. 85; *Ormsby* v. *People*, 53 N. Y. 472; and it is sufficient to render such declarations and acts admissible, if the conspiracy be established by one competent witness: *Commonwealth* v. *Crowninshield*, 10 Pick. 497. The exception, however, to this general rule is, that the state may prove the facts in any order it chooses as to conspiracy, and acts done and declarations made. The acts and declarations are sometimes admitted in evidence, first, as a matter of convenience upon an undertaking by the prosecution to subsequently connect the evidence by proof of the conspiracy. This mode of proceeding rests largely in the discretion of the judge, but should not be permitted except in cases where particular and urgent circumstances necessitate such departure from the general rule: *Bloomer* v. *State*, 48 Md. 521; *People* v. *Brotherton*, 47 Cal. 388; *State* v. *Ross*, 29 Mo. 32, 51; *Avery* v. *State*, 10 Tex. App. 199; *Kennedy* v. *State*, 19 Tex. App. 618; *Miller* v. *Barber*, 66 N. Y. 558, 567. But see *State* v. *Nash*, 9 Iowa, 349, 384; *Wiggins* v. *Leonard*, 9 Id. 194; *Forshee* v. *Abrams*, 2 Id. 571. So it is held in *Jenne* v. *Joselyn*, 41 Vt. 478, 483,

that the order of the evidence is of no material consequence so far as its ultimate legitimacy is concerned, provided it is in the end pertinent to the issue in its relation to the other evidence in the case. The words of the court in *Place* v. *Minster*, 65 N. Y. 89, 105, are in point. It is there said that "the time of admitting the declarations is a mere question of order in the proceedings which is a matter of discretion with the court. Nothing can be better settled than the main proposition that the declarations of one alleged conspirator cannot be admitted against his associates unless the conspiracy be established. There is, however, no rule that the conspiracy must be established first in the order of time. Convenience may require that the declaration be admitted provisionally, subject to subsequent proof of the conspiracy. If that is not offered, it should be stricken out. If this discretion is abused, there will be error. . . . . But this [change in the order of the evidence] is not permitted except under particular and urgent circumstances, lest the jury should be misled to infer the fact itself of the conspiracy from the declarations of strangers." This discretion, however, should be exercised with the utmost caution, lest the jury be misled and infer the fact of a concert or conspiracy where none existed: *Burke* v. *Miller*, 7 Cush. 547. Substantially the same ruling obtains in Alabama in regard to the order of the testimony being in the discretion of the court, since it is held in that state that whatever error exists by admitting evidence of such acts and declarations first, it is cured by the subsequent introduction of proof to connect by showing the existence of the conspiracy: *Johnson* v. *State*, 29 Ala. 62; *Scott* v. *State*, 30 Id. 503.

Sufficiency of Evidence to Establish Conspiracy so as to Admit Proof of Acts, etc. — Whether a conspiracy exists must satisfactorily appear to the court in the first instance when called to rule as to the competency of the testimony, and if, after the acts and declarations are admitted in evidence, the testimony to establish the conspiracy is not conclusive, "the question as to the existence of such conspiracy at the time of the acts or declarations should be submitted to the jury under appppropriate instructions": *Loggins* v. *State*, 8 Tex. App. 434, 443; 12 Id. 65, 75; citing *Ormsby* v. *People*, 53 N. Y. 472; and see *Burke* v. *Miller*, 7 Cush. 547; and the question of whether the parties actually did confederate in a common purpose, and whether the acts and declarations offered in evidence were actually done in furtherance of that design, is for the determination of the jury: *Commonwealth* v. *Brown*, 14 Gray, 419, 432; but see *Oldham* v. *Bentley*, 6 B. Mon. 428, 431.

INSTRUCTIONS. — In case the evidence of such acts and declarations is received upon a promise to connect by showing the conspiracy, and there is a failure to connect, it is the duty of the court to charge the jury to disregard such evidence of acts and declarations: *Miller* v. *Barber*, 66 N. Y. 558, 567; *Loggins* v. *State*, 8 Tex. App. 434, 443; 12 Tex. App. 65, 75.

It is held in *Wiggins* v. *Leonard*, 9 Iowa, 194, that a distinction should be made by the court, in its charge to the jury, between the evidence which should go to establish the combination and that which is to be received only in case such confederacy is first proven and found by them, or as to the persons who should be found united in it. There should be instructions "both in respect to the period at which or the circumstances under which they [the jury] might receive evidence of the acts or declarations of a confederate, and in respect to the persons who must be found united in the common purpose." And the admission under the objection of competent evidence which the jury are afterward instructed to disregard is no ground of exception: *Commonwealth* v. *Scott*, 123 Mass. 222; 25 Am. Rep. 81.

MATTERS OF DEFENSE. — The fact that the several overt acts constitute separate criminal offenses is not a defense to an indictment for conspiracy, nor a bar to a prosecution therefor: *United States* v. *Rindskopf*, 6 Biss. 259, criticising *Commonwealth* v. *Kingsley*, 5 Mass. 106; nor is it any defense that the object of a conspiracy would have been effected without the participation of the accused. If his acts were such as naturally to cause or bring about the result, he is liable: *Green* v. *Cochran*, 43 Iowa, 544; nor is it a ground of acquittal for conspiracy that the misdemeanor is merged in the felony: *Regina* v. *Button*, 3 Cox C. C. 229.

But where a person was placed in an insane asylum under a *bona fide* although mistaken belief of her insanity, by her mother and relatives, and the question arose whether such mistaken belief was a defense, it was held that in such case the law having been strictly complied with in making the commitment, and there being an absence of a corrupt motive, that a charge of conspiracy could not be sustained: *Commonwealth* v. *Minzer*, 9 Cox C. C. 145; 3 Lawson's Criminal Defenses, ed. 1887, p. 602, sec. 188; and the fact that the victim of the alleged conspiracy was himself engaged in an illegal act constitutes a defense: 4 Lawson's Criminal Defenses, p. 616, sec. 220. So it was held in *State* v. *Crowley*, 41 Wis. 271, 22 Am. Rep. 719, that a conspiracy between two persons to defraud a third, in an unlawful enterprise in which they all join, is not criminal, because conspiracy is not criminal unless against an innocent person; as where A and B conspired to defraud C by falsely pretending that parcels sold by them to him contained counterfeit money, when in fact they contained sawdust, it was held that A and B could not be convicted of a conspiracy to obtain money of C by false pretenses.

MERGER. — There are some authorities which hold that if the act for the doing of which the parties conspire is a felony, and is executed, the conspiracy becomes merged in the higher crime: Desty's Crim. Law, sec. 11 a; *State* v. *Noyes*, 25 Vt. 415, 421; *State* v. *Mayberry*, 48 Me. 218; *Elkin* v. *People*, 28 N. Y. 177; *Commonwealth* v. *Kingsbury*, 5 Mass. 106; *State* v. *Murphy*, 6 Ala. 765; 41 Am. Dec. 79; *People* v. *Richards*, 1 Mich. 216; 51 Am. Dec. 75; *People* v. *Mather*, 4 Wend. 215; 21 Am. Dec. 122; *Commonwealth* v. *Goodhue*, 2 Met. 193; *Hartman* v. *Commonwealth*, 5 Pa. St. 60; *Elsey* v. *State*, 47 Ark. 572. But this doctrine is declared by Mr. Bishop not to be general American law: 1 Bishop's Crim. Law, sec. 814. In *Johnson* v. *State*, 29 N. J. L. 453, it is said that the "question of merger only applies when the same act constitutes both offenses. But when the indictment charges that the defendants at one time were guilty of conspiracy, and at another time were guilty of perjury, there is no merger." Where two crimes, however, are of equal grade, there can be no legal technical merger: *State* v. *Murphy*, 6 Ala. 765; 41 Am. Dec. 79; *People* v. *Richards*, 1 Mich. 216; 51 Am. Dec. 75; *United States* v. *Martin*, 4 Cliff. 156; *Commonwealth* v. *Walker*, 108 Mass. 309; *State* v. *Murray*, 15 Me. 100; *People* v. *Mather*, 4 Wend. 215; 21 Am. Dec. 122; *State* v. *Noyes*, *supra*. So the offense of impeding an officer in the execution of legal process, and that of conspiracy to impede, are, in effect, of the same grade, and the latter does not merge in the former: *State* v. *Noyes*, *supra*.

SEPARATE TRIALS. — Where A and B are jointly indicted for a felony, and the court, upon the statement of the prosecuting attorney, determines that the interests of the public require that A be tried first, no error can be predicated upon a refusal of the court to permit B to be tried first: *State* v. *Nash*, 7 Iowa, 347, 374.

ACQUITTAL OF ONE CONSPIRATOR WHERE TWO ARE INDICTED is an acquittal of the other: Note 51 Am. Dec. 84. Since, if two persons are indicted for conspiracy in one indictment, the gist of the conspiracy is whether both are guilty; therefore both must be acquited or both convicted: *Rex* v. *Manning*, Q. B. (1884); 4 Lawson's Criminal Defenses, ed. 1887, 578; and see *O'Connell* v. *Queen*, 11 Clark & F. 155; *Harrison* v. *Errington*, Poph. 202; *Regina* v. *Kinnersley*, 1 Strange, 193; *Rex* v. *Ahearne*, 6 Cox C. C. 6. In the following case there was an indictment by conspiracy against A and B alone; both appeared and answered to the indictment. B was put on trial, and A used as a witness for the state. After the jury retired, a *nol pros.* was entered as to A, and a verdict of guilty against B. It was held that judgment could not be pronounced on the verdict, the effect of the *nol pros.* being to leave the indictment as if it charged B alone with the conspiracy: *State* v. *Jackson*, 7 S. C. 283; 24 Am. Rep. 476.

JUDGMENT should be several against each defendant, and not against them jointly, on an indictment against two for a conspiracy to cheat: *March* v. *People*, 7 Barb. 391; 4 Lawson's Criminal Defenses, ed. 1887, 530.

CONSPIRACIES TO CONTROL WAGES OR WORKMEN — BOYCOTTING AS CRIMINAL CONSPIRACY: *People* v. *Fisher*, 28 Am. Dec. 501, and note 507; note 76 Am. Dec. 783; *State* v. *Stewart*, 59 Vt. 273; 59 Am. Rep. 710, and note 720; and see 4 Lawson's Criminal Defenses, ed. 1887, 616, 618, secs. 221. 221 a; *State* v. *Glidden*, *ante*, p. 23, and note.

FIETSAM *v.* HAY.

[122 ILLINOIS, 293.]

TERM "FRANCHISE" IN ITS APPROPRIATE AND LEGAL SENSE IS CONFINED to such rights and privileges as are conferred upon corporate bodies by legislative grant. It is the right or privilege of being a corporation, and of doing such things, and such things only, as are authorized by the corporation's charter.

FRANCHISE, OR RIGHT TO BE AND ACT AS ARTIFICIAL BODY, IS VESTED in the individuals who compose the corporation, and not in the corporation itself.

CORPORATION AGGREGATE IS ARTIFICIAL BEING CREATED BY LAW, and composed of individuals who subsist as a body politic under a special denomination, with the capacity of perpetual succession, and of acting, within the scope of its charter, as a natural person. The corporate body, for most purposes, has a distinct identity from that of the individual corporators.

CORPORATION, IN ABSENCE OF STATUTORY AUTHORITY, HAS NO RIGHT to sell or transfer its franchise, or any property essential to its exercise, which it has acquired under the law of eminent domain.

APPEAL from the circuit court of St. Clair County. The opinion states the case.

F. A. McConaughy, for the appellant.

By Court, MULKEY, J. The People's Bank of Belleville, incorporated under a special act of the legislature, approved and

in force March 27, 1869, having become insolvent, on the 17th of April, 1878, made a general assignment of all its property and effects for the benefit of creditors. The assignee presented a petition to the county court of St. Clair County, at its March term, 1887, for leave to sell "all the rights, privileges, powers, and immunities which where granted by the said act incorporating said bank." The judge of the county court being interested in the result of the proceeding, the venue was changed to the circuit court of St. Clair County, where, upon due consideration of the petition, that court entered an order dismissing the same. The present appeal is from the order of dismissal.

The correctness of the decision of the circuit court depends entirely upon whether the title to the franchise created and conferred by the bank charter passed, as an asset of the bank, to the assignee, under the assignment. That its language is sufficiently comprehensive and adequate to pass the franchise to the assignee, if, as matter of law, the bank could transfer it at all, we have no doubt. This is not questioned. The question, therefore, is, whether a corporate franchise, in the absence of statutory authority, is in law capable of being assigned or transferred. Differently put, the question, as formulated by the parties themselves, is, "Did the franchise of the said bank pass with the deed of assignment to the assignee as a salable asset of the said bank?"

The word "franchise" is often used in the sense of privileges generally, but in its more appropriate and legal sense the term is confined to such rights and privileges as are conferred upon corporate bodies by legislative grant. It is in the latter sense, alone, the word is now to be considered. The franchise proposed to be sold is a corporate franchise, and the artificial body or political entity to which it pertains is what is known to the law as an aggregate corporation. Such a corporation has been well defined to be, "an artificial being created by law, and composed of individuals who subsist as a body politic under a special denomination, with the capacity of perpetual succession, and of acting, within the scope of its charter, as a natural person." Now, a franchise is nothing more than the right or previlege of being a corporation, and of doing such things, and such things only, as are authorized by the corporation's charter. This right of a body of men to be and act as an artificial person, without, as a general rule, incurring individual responsibility, is declared by Blackstone to be "a royal

privilege, or branch of the king's prerogative, subsisting in the hands of a subject": 2 Bla. Com. 37. Such right or franchise is defined by Bouvier to be "a certain privilege conferred by grant from government, and vested in individuals": 1 Bouv. Law Dict. 545. Now, it is clear from these definitions, and from the very nature of a corporation, that a franchise, or the right to be and act as an artificial body, vests in the individuals who compose the corporation, and not in the corporation itself. This fact, we think, is not without significance in reaching a conclusion upon the main question to be determined, outside of the numerous authorities bearing directly on the subject.

It will be kept in mind that the corporation body, for purposes of ownership, and indeed for most purposes, has a distinct identity from that of the individual corporators. The latter may be wealthy when at the same time the former is insolvent, and *vice versa*. The corporation has no right to appropriate, sell, or otherwise dispose of any of the property or effects of a corporator. The relation of debtor and creditor may subsist between them in the same manner as between the company and other persons. The company's entire property may be swept away from it by sequestration, or other means, and yet its franchises will remain vested in the corporators until they are either abandoned or forfeited to the state. All these propositions are familiar to the courts and the profession, and are well sustained by authority.

If, then, the franchise is vested in and belongs to the corporators, and not to the corporation itself, how could the latter transfer or assign it to another? On the plainest of principles, this could not be done without legislative authority for that purpose, and we find nothing, either in the statute or the company's charter, conferring such authority. While it is conceded the legislature might confer on the artificial body the power to sell or assign the franchise to strangers, yet this would be in effect to authorize it to commit a species of suicide, for it is manifest the corporation could not exist a moment after the franchise conferred upon its members had been transferred to others. Indeed, when we consider the attributes and essential elements of corporate existence, resulting from the grant of the franchise, and without which the artificial body could not accomplish the objects of its creation or perform the duties imposed upon it by law, the sale or assignment of the franchise without special legislative authority

would seem to be wholly inadmissible. It is proposed here, it will be noted, to sell simply the franchise of the bank. Assuming this can be done, the question arises, What would be the effect of such a sale? It clearly could not have the effect of making the purchasers, if more than one, an aggregate corporation with the general banking powers conferred by the bank charter. To assert such a proposition would be simply startling; and yet, if in such case the purchasers would take anything at all, they certainly could not take less than the right to be a banking corporation, with all the powers and privileges conferred by the charter for these rights, — one of the very essence of the franchise; and consequently the one could not be thus acquired without, by the same act, securing the others, — a view which, as already indicated, has no sanction in reason or authority.

While statements are to be found on this subject in some of the text-books as well as in some of the decided cases which cannot be reconciled with the conclusion we have reached, yet we are clearly of opinion that a corporation, in the absence of statutory authority, has no right to sell or transfer its franchise, or any property essential to its exercise which it has acquired under the law of eminent domain. This proposition, in our judgment, is sustained both by reason and the decided weight of authority: *Black* v. *Delaware and Raritan Canal Co.*, 24 N. J. Eq. 455; Freeman on Executions, secs. 179, 180; Pearce on Railroads, 496; Jones on Mortgages, sec. 161; Rorer on Judicial Sales, 2d ed., 222; *Archer* v. *Terre Haute etc. R. R. Co.*, 102 Ill. 493; *Bruffett* v. *Great Western R. R. Co.*, 25 Id. 353; *Chicago etc. R. R. Co.* v. *Whipple*, 22 Id. 105; *Ottawa etc. R. R. Co.* v. *Black*, 79 Id. 262.

The circuit court having reached this conclusion, its order and judgment will be affirmed.

Judgment affirmed.

CORPORATION IS FRANCHISE: *Cleveland etc. R. R. Co.* v. *Speer*, 94 Am. Dec. 84.

CLASSIFICATION OF CORPORATIONS: *Miners' Ditch Co.* v. *Zellerbach*, 99 Am. Dec. 300.

CORPORATIONS HAVE SUCH POWERS only as the act creating them confers, and such incidental powers as are necessary to carry into effect those specially conferred: *Chicago Gas Light Co.* v. *People's Gas Light Co.*, 2 Am. St. Rep. 124; *Caldwell* v. *Alton*, 85 Am. Dec. 282, and cases collected in note 288; *Franklin Co.* v. *Lewiston Institution for Savings*, 28 Am. Rep. 9.

SALE BY CORPORATION OF ALL ITS ASSETS: See *Miners' Ditch Co.* v. *Zellerbach*, 99 Am. Dec. 300, and extended note 333–338.

POWER OF CORPORATION TO ALIENATE FRANCHISE: *Story* v. *Plank Road Co.*, 84 Am. Dec. 134; *People* v. *Railroad Co.*, 82 Id. 295; *Coe* v. *Railroad Co.*, 75 Id. 518, and note 548.

CORPORATE FRANCHISE IS NOT SUBJECT TO ORDINARY EXECUTION: *Amment* v. *Turnpike Road*, 15 Am. Dec. 595, and note 596.

GRANT OF FRANCHISE TO ONE CORPORATION DOES NOT PREVENT LIKE GRANT TO ANOTHER: *Hudson* v. *Cuero Land etc. Co.*, 26 Am. Rep. 289, and note 293.

DUNNIGAN *v.* STEVENS.

[122 ILLINOIS, 396.]

LAW OF INDIANA GOVERNS AS TO LIABILITY OF INDORSER where promissory notes are made and indorsed in that state.

UNDER LAW MERCHANT, INDORSEMENT OF NOTE AMOUNTS TO CONTRACT on the part of the indorser, that if, when duly presented, the note is not paid by the maker, the indorser will, upon due and reasonable notice given him of the dishonor, pay it to the indorsee or other holder.

INDORSER MAY, BY FORM OF HIS INDORSEMENT, MAKE HIMSELF ABSOLUTELY and positively, in all events, liable for the payment of the note, with or without due presentment or due notice of non-payment. If there be an agreement in writing to dispense with any demand upon the maker, or with notice of dishonor, the language will be construed to import an absolute dispensation, with the ordinary conditions of an indorsement, and the liability of the indorser will become as full as that of a surety or guarantor.

LAW MERCHANT IN FORCE IN INDIANA APPLIES to a note payable in a bank in that state; and where there is an express waiver in writing by the indorser, of presentment of the note for payment, and of notice of its non-payment, this dispenses with the conditions precedent to the indorser's liability, and makes his obligation for the payment of the note unconditional and absolute. On maturity of the note, the holder may immediately bring suit against the indorser without performance of any act.

WHERE INDORSER OF PROMISSORY NOTE IS LIABLE ABSOLUTELY for its payment, the indorsee of such note may, under the provisions of the Illinois Revised Statutes, chapter 3, section 67, relating to the settlement of the estates of deceased persons, and before maturity of the note, have the same allowed against the estate of the indorser. The statute is, that "any creditor whose debt or claim against the estate is not due may present the same for allowance and settlement," and the indorsee of the note in such case is a creditor within the statute.

APPEAL from the appellate court, third district. The opinion states the case.

S. S. Whitehead, for the appellant.

Golden and Hamill, for the appellee.

By Court, SHELDON, C. J. On January 1, 1881, Clemuel R. Stevens, deceased, sold a farm in Sullivan County, Indiana,

to one Samuel H. Kisner for an agreed consideration of eight thousand dollars. The sum of five hundred dollars was paid in cash, and for the remainder of the purchase-money Kisner executed his notes to Stevens, payable in bank in one, two, three, four, five, six, seven, eight, nine, and ten years after date, with interest payable annually at the rate of eight per cent, and secured the payment of the same by mortgage on the premises purchased. Afterwards, Stevens purchased of Richard Dunnigan some land situate in Clark County, Illinois, and in payment therefor transferred to Dunnigan by indorsement in blank six of the Kisner notes, the ones falling due January 1, 1886, and after. Stevens died, and after his death his administrator sold the remaining notes—the ones falling due January 1, 1882, 1883, 1884, and 1885—to one John J. Brake. The notes maturing up to January 1, 1884, remaining unpaid, Brake commenced proceedings to foreclose the mortgage aforesaid in the circuit court of Sullivan County, Indiana, making Kisner and Dunnigan the only parties defendant. Dunnigan filed an answer, also a cross-complaint, claiming an interest in the mortgaged property. A judgment of foreclosure was rendered, finding that the mortgaged property was not susceptible of sale in parcels, and directing that it be sold as a whole, and the proceeds applied, first, to indebtedness due; second, to that not due with a rebate, etc. A sale under this judgment resulted in only enough to satisfy the Brake notes, and pay the sum of five hundred dollars on the notes held by Dunnigan. A personal judgment in the foreclosure suit was rendered against Kisner, and an execution issued thereon was returned no property found. Dunnigan filed his claim against Stevens, as indorser of the notes so indorsed by him to Dunnigan for allowance against the estate of Stevens in the county court of Clark County, where the claim was disallowed. On appeal to the circuit court there was a judgment given against the administrator for five hundred and sixty dollars, the amount of interest due on the notes, and that Dunnigan pay the costs in the proceeding, the claim having been filed subsequent to the time appointed by the administrator for the presentation of claims against the estate. The judgment of the circuit court was affirmed by the appellate court for the third district, and this writ of error is brought to reverse the judgment of the appellate court.

The following is a copy of one of the notes in question, and the indorsement:—

"$500. TERRE HAUTE, INDIANA, January 1, 1881.

"Five years after date, I promise to pay to the order of Clemuel R. Stevens, at P. Shannon's bank, Terre Haute, Indiana, five hundred dollars, value received, without any relief from valuation and appraisement laws, with interest at eight per cent per annum from date until paid, and attorneys' fees.

"The drawers and indorsers severally waive presentment for payment, protest, and notice of protest, and non-payment of this note. Interest payable annually.

"No. 5. SAMUEL H. KISNER."

Indorsed: "C. R. STEVENS."

The notes are all alike, except in amount and time of payment, the others being for seven hundred dollars each. The notes and the indorsements were both made in the state of Indiana.

The statute of Indiana at the time provided as follows: "Notes payable to order or bearer in a bank in this state shall be negotiable as inland bills of exchange, and the payees and indorsers thereof may recover as in case of such bills." It is held by the supreme court of Indiana that the provisions of the law merchant in regard to the presentment for payment, and notice of protest and of non-payment, may be waived by the terms of the contract, and such waiver extends to the indorsers.

Our statute concerning the settlement of the estates of deceased persons provides: "Any creditor whose debt or claim against the estate is not due may nevertheless present the same for allowance and settlement, and shall thereupon be considered as a creditor under this act, and shall receive a dividend of said decedent's estate, after deducting a rebate of interest for what he shall receive on such debt, to be computed from the time of the allowance thereof to the time such debt would have become due according to the tenor and effect of the contract": R. S., sec. 67, c. 3. And section 70 declares that all debts and demands not exhibited to the court within two years from the granting of letters of administration shall be forever barred except as to subsequently discovered assets.

Considerable stress has been laid in argument on the fact of the insolvency of the maker Stevens,—of there having been personal judgment against him, and his estate ex-

hausted. Under our statute this would be important, as showing diligence to collect of the maker; but the notes and indorsements having been made in the state of Indiana, it is the law of that state which is to govern in respect to the liability of the indorser. The notes being payable in a bank in that state, the indorser's liability, by the statute there, is that which arises under the law merchant. Under that law, the indorsement of a note amounts to a contract on the part of the indorser, that if, when duly presented the note is not paid by the maker, he, the indorser, will, upon due and reasonable notice given him of the dishonor, pay the same to the indorsee or other holder: Story on Promissory Notes, sec. 135. But here there is an express waiver in writing by the indorser of presentment of the notes for payment, and of notice of their nonpayment. This dispenses with the conditions precedent to the indorser's liability, and makes his obligation for the payment of the notes to be unconditional and absolute. On the maturity of the notes, the holder might immediately bring suit against the indorser without performance of any act.

An indorser may by the form of his indorsement make himself absolutely and positively, in all events, liable for the payment of the note, with or without due presentment or due notice: Story on Promissory Notes, sec. 461. Where there is an agreement in writing to dispense with any demand upon the maker, or with notice of dishonor, the language will be construed to import an absolute dispensation with the ordinary conditions of an indorsement: Id., sec. 148. We consider that the indorser here by the form of his indorsement made himself absolutely and positively, in all events, liable for the payment of the notes,—that his liability was as full as that of a surety or a guarantor; and the obligation of a surety or the guarantor of a promissory note is absolute to pay the note: *Hunt* v. *Adams*, 5 Mass. 519; *Luqueer* v. *Prosser*, 1 Hill, 256. And see Story on Promissory Notes, secs. 58, 59, and note.

It is said the indorser's contract here was to pay the notes, if, when they became due, the maker did not pay them; and that when the notes were filed the condition had not been met. We do not consider that there is any such distinct condition as thus named,—that there is any other condition than what is comprised in presentment for payment and notice of nonpayment. The condition in this respect, as above stated by Story, is, "that if when duly presented, it [the note] is not

paid by the maker," etc. Dispensing with presentment carries with it all condition as to paying on the maker's failure to pay on presentment. And even if the contract were, as thus supposed, to pay the notes if when they became due the maker did not pay them, we hardly see how, in respect of liability to the indorsee, that would vary essentially from an absolute promise to pay the notes, or that the notes should be paid. Either form of promise would oblige the payment to be made at maturity, and would create the equal liability of the indorser for their payment at maturity.

It is again said, the maker might pay the notes at maturity, and so the indorser not have them to pay. But this would not be inconsistent with the indorser's liability for the payment of the notes.

The same might be said in respect of a surety or a guarantor that the principal debtor might pay the debt on its coming due; yet that would not militate against the previous obligation of the surety or guarantor to pay the debt. So in the case of several makers of a promissory note, upon the death of one of them the claim of the whole note, we take it, might be filed and allowed against his estate, notwithstanding that on the note becoming due it might be paid by the surviving promisors, or each of them might pay his proportion of it, so that the defendant's estate would have none, or but a proportional part, of the debt to pay.

We think the indorser here undertook that these notes should be paid at maturity; that there was a binding obligation on his part for their payment; that there was no condition or contingency as to the obligation itself, but that it was absolute and positive, and constituted a claim against the estate of the indorser; that it was properly filed as such against the estate, and that the rejection of it by the court, except as to the amount actually due, was erroneous. The statute required it to be exhibited to the county court within two years from the granting of letters of administration, or else be forever barred, except as to subsequently discovered assets. The statute is, that "any creditor whose debt or claim against the estate is not due may present the same for allowance and settlement." "A creditor is he who has a right to require the fulfillment of an obligation or contract": Bouv. Law Dict. Dunnigan certainly occupied this position, and he held a claim against the estate not due, bringing himself precisely within the statute.

The judgments of the appellate and circuit courts will be

reversed, and the cause remanded to the circuit court of Edgar County.

Judgment reversed.

SCHOLFIELD, J. I am unable to concur in the reasoning in the foregoing opinion. The statute therein quoted, to the effect that "any creditor whose debt or claim against the estate is not yet due may present the same for allowance and settlement," is in derogation of the common law, and by a familiar rule of construction is therefore to be construed strictly. So construing it, the words, "debts or claims against the estate," must mean existing debts or claims, and not probable future debts or claims.

But it is conceded here that the contract of Stevens, under the statutes of Indiana, where the notes were made and indorsed, is governed by the law merchant, and that by that law his liability (he having waived presentment and notice) is to pay the notes when due, if Kisner does not pay them then. Kisner is liable absolutely to pay the notes; but Stevens is only liable to pay them contingently upon Kisner's not paying them when due. The difference between the character of liability of Kisner and Stevens is plain and broad. It may be that the day of payment as to Kisner might, in the event of Kisner's death, be accelerated without seriously impairing any right, since it would only affect the question of interest, which the statute equitably provides for. But accelerating the day of payment as to Stevens is a very different thing. He was entitled to the benefit of the chance of Kisner being able to pay the debt at any time until after maturity. Although Kisner may not now be able to pay, it does not follow that he may not be able to pay the notes when due. By this opinion, a liability to pay in the future, upon condition, is converted into a present, absolute liability,—a new contract is made for Stevens, to which he never gave his assent. This, in my opinion, cannot be done.

MAGRUDER, J. I concur in the views expressed by Mr. Justice Scholfield.

INDORSER'S LIABILITY GOVERNED BY LAW OF PLACE OF PAYMENT: *Wooley* v. *Lyon*, 57 Am. Rep. 867. But compare, on this subject, *Hunt* v. *Standart*, 77 Am. Dec. 79, and cases collected in note 87; *Freese* v. *Brownell*, 10 Am. Rep. 239; *Briggs* v. *Latham*, 59 Id. 546; *Ford* v. *Buckeye State Ins. Co.*, 99 Am. Dec. 672, note; *Rose* v. *Park Bank*, 83 Id. 306.

INDORSER OF NOTE BEFORE DELIVERY TO PAYEE, LIABILITY OF: *Van Doren v. Tjader*, 90 Am. Dec. 498, and note 503; *Burton v. Hansford*, 27 Am. Rep. 571, and note 580.

INDORSEMENT, PAROL EVIDENCE TO CONTROL OR VARY EFFECT OF: *Hill v. Ely*, 9 Am. Dec. 376, and note 381; *Stack v. Beach*, 39 Am. Rep. 113, and note 116.

INDORSEMENT "WITHOUT RECOURSE," FORM AND EFFECT OF: *Watson v. Chesire*, 87 Am. Dec. 382, and note 389.

VALLETTE *v.* TEDENS.

[122 ILLINOIS, 607.]

PERSONS ENGAGED IN BUSINESS OF MAKING ABSTRACTS OF TITLE occupy a relation of confidence towards those employing them, which is second only in the sacredness of its nature to the relation which a lawyer sustains to his client. They should be held to a strict responsibility in the exercise of the trust and confidence which are necessarily reposed in them, and any abuse of such trust and confidence should be met with emphatic rebuke.

TRUST, WHEN IT ARISES — ABUSE OF CONFIDENTIAL RELATION. — The defendant, who was a county surveyor and abstract maker, was employed by the plaintiffs to examine title to land, with a view of correcting defects therein, and also to procure for them the title to certain adjacent land. The defendant, while engaged in the service of the plaintiffs, acquired the title to the last-mentioned land in his own name, and refused to convey to the plaintiffs. *Held*, that the defendant was not simply an agent to purchase, but his agency concerned other matters, and his relations to the plaintiffs were of such a confidential nature that he must be regarded as holding in trust for the plaintiffs the title acquired by him.

APPEAL from the circuit court, Du Page County. The facts appear in the opinion.

Henry Decker, for the appellant.

Comstock and Hess, for the appellees.

By Court, MAGRUDER, J. In the fall of 1884 and winter of 1884 and 1885, the appellees were merchants, engaged in business under the firm name of Tedens & Co., in the town of Lemont, in Cook County. One Walker had become largely indebted to them, and had given them a mortgage upon certain lands owned by him in Du Page County. This mortgage they had foreclosed, and had acquired title to the lands embraced in it through the foreclosure sale. In addition to this, they also had judgments against Walker, which they were desirous of making out of whatever lands or interests in lands he night own that were not included in the mortgage.

At this time, appellant was the county surveyor of Du Page County. He was also engaged in the business of examining titles, and making abstracts of titles, and had an office, where he carried on such business, in Wheaton, Du Page County. On November 18, 1884, appellees wrote to appellant the following letter:—

"LEMONT, ILL., November 18, 1884.

"COUNTY SURVEYOR, Wheaton, Ill.

"*Dear Sir*,—When can you come and make survey of the land known as the 'Walker tract,' in Du Page County? We now own it, and wish to fence and rent; therefore a survey is very necessary. Hoping you will favor us with an early reply, and that you will come soon, now while the wheather is so fine and good for such work, we are

"Yours, etc., J. H. TEDENS & Co."

Pursuant to the notice contained in this letter, appellant went to Lemont on December 1, 1884, and was there engaged for four days in making surveys for appellees, and in consulting with them about titles to property, in which Walker was supposed to have an interest. The land, or part of the land, to which appellees had acquired title by the foreclosure proceeding, consisted of about one hundred acres in that part of the northeast quarter of section 15, lying north of the north channel of the Des Plaines River, there being an island at this point around which the river flows in two channels, one to the north and the other to the south of the island. The land in controversy in this suit is a tract of forty-five acres, situated on the island in question in the southeast corner of the northeast quarter of section 15, south of the north channel of the river, and opposite the one hundred acres above mentioned.

Appellees had supposed until after the foreclosure that the forty-five acres were included in their trust deed; this, however, did not prove to be the case. They had also supposed that the forty-five acres belonged to Walker. Walker had been in possession of it at one period for some twelve years or longer, and was reputed to have acquired his title from a widow named Warden, who had also owned the balance of section 15. While appellant was in Lemont, during the first four days of December, 1884, he also shared the belief that Walker had title to the forty-five acres, although both he and appellees were aware at this time that the land was not taxed. While engaged in this survey for appellees, appellant learned from them the location and surroundings of the forty-five acres. Both the

appellees swear that on December 2d or 3d they employed appellant, as an examiner of titles, to search the records and look up the title to the forty-five acres, and to assist them in acquiring such title. They are confirmed in their statements by the testimony of one Graves. At the same time they gave appellant a list of other lands in sections 14, 15, and 16, in which Walker was supposed to be interested, and employed him to ascertain the condition of the title to these lands, with a view of subjecting them to the payment of their judgments.

On the evening of December 4th, when appellant left Lemont, appellees placed in his hands their own abstract of title to the lands they had obtained from Walker, and requested him to examine the title, so that if there were any defects they might be remedied. At their request he made a map of the lands lying in sections 14, 15, and 16, and left it with them.

Appellant procured the title to the forty-five acres in question for himself, denying the existence of any agreement to obtain it for appellees, and pleading the statutes of frauds. The object of this bill is to compel him to convey the land to appellees, on the ground that he holds it as their agent and trustee.

After leaving Lemont, appellant made examinations in the records and tax books of Du Page County, and in the books of certain abstract makers in Chicago, and on December 8, 1884, wrote the following letter:—

"WHEATON, ILL., December 8, 1884.

"J. H. TEDENS & Co., Lemont, Ill.

"*Gents*,—I have looked up the 5.07 acres N. Frac. N. W. ¼ Sec. 14, 37.11, and find that it was entered June, 1835, by Philip C. Latham, and conveyed by him to Thomas Haughan June 5, 1842. I don't think it has been conveyed since by the owner. As to the 45 or any Island Frac. N. ½ Sec. 15, 37.11, the title is in either the canal trustees, or to whom they sold it. There is no deed or record of the tract to any persons. Island Frac. of Sec. 16, is still in the state of Illinois, for use of, etc., of T. 37.11. If you wish me to go and see the records in canal commissioners' office, I can do so as soon as you send to me. I don't find that Roebuck has any title on Sec. 14, S. of river, or on the island. Please give inclosed to Tagerstrum. I have not yet been through examination of the abstract as to your title, but I think I will have time this week.

"Yours, J. G. VALLETTE."

This letter amounts to a written statement by the defendant that he was acting as the agent of the appellees in looking up the titles to various pieces of land including the forty-five acres, and also that he was acting as their attorney in examining for them the title which they already had. He states the result of his investigations as to the forty-five acres, and proposes to make further investigations at the office of the canal commissioners, if appellees shall send to him to do so. The appellee, Tedens, swears that he answered the letter of December 8th, telling appellant to go ahead and visit the canal office and "look up the title there," and that he would be paid for his services. His testimony as to the contents of the answer was given after appellant's failure to produce it, upon being notified to do so. Appellant denies that he received any reply to the letter of December 8th.

Appellant sent to the canal office for information, and obtained therefrom a paper, dated December 14, 1884, showing that the north fraction of the north-east quarter had been sold by the canal trustees to John B. Witt, and that the certificate of purchase had been assigned to Peter Warden, and also showing that the forty-five acres had been sold by the trustees on September 11, 1848, to John B. Witt. Witt had died, and in order to get title, it became necessary to obtain conveyances from his heirs.

On January 3, 1885, appellant again went to Lemont and continued the survey for appellees, which he had not finished in December. Appellee Tedens swears that during this visit in January appellant spoke of some of the heirs as being in Iowa, and of some as living in Kansas, and expressed his intention of going to Kansas, as soon as he finished the survey he was then engaged in making. Appellant swears that at this time in January he had no conversation whatever with either of the appellees about the forty-five acres, except that when he and Thormahlen were at the land he asked Thormahlen what it was worth, and was told that its value was fifty dollars or seventy-five dollars per acre. If the statement of appellee Tedens, as to what took place when appellant was in Lemont on January 3, 1885, is true, then appellant led the appellees to believe that he was trying to obtain the title of the Witt heirs for them, and not for himself. If his own statement is true, then he acted unfairly towards the appellees in concealing from them what he had learned from the canal commissioners on December 14th,

namely, that the title to the forty-five acres was not in Walker, but in John B. Witt or his heirs. That information was procured by him while acting as their agent and in pursuance of their employment, and should have been communicated to them. Instead of making them acquainted with the real condition of affairs, he went to work to procure the title for himself, while engaged in their service.

On January 5th, according to his own evidence, he opened negotiations with the heirs for the purchase of their interest, and by the second day of February had procured conveyances from them to himself. On January 9, 1885, he sent the following letter to appellees: —

"WHEATON, ILL., January 9, 1885.

"J. H. TEDENS & Co.

"*Gents*, — Do you want me to make abstract of lot 13, School Trustees Sub. of Sec. 16, 37.11? I think you had better only show title acquired by Edwin Walker, and it may be better to have full abstract made new, and show the full proceedings followed by your deeds, so as to show your full title in the whole business. I think it will pay you. Also, what will you give for the forty-five acres on the island, if I can get a title for you?

"Yours very truly, J. G. VALLETTE."

It is here apparent that appellant was acting as agent and adviser of the appellees, and was still holding out to them the idea that the title to the forty-five acres was to be obtained for them. They replied to his letter as follows: —

"LEMONT, ILL., January 17, 1885.

"J. G. VALLETTE, ESQ., County Surveyor, Wheaton, Ill.

"*Dear Sir*, — Our Mr. Tedens will call on you next Tuesday or Wednesday in regards examination abstracts and tracts and adjoinings you have surveyed for us. If not convenient for you to meet him on them days, please so inform us.

"Yours, etc., J. H. TEDENS & Co."

Appellee Tedens swears that on January 21, 1885, he met the appellant at the office of Haddock, Vallette, and Rickords, in Chicago, and it was there agreed between them that appellant should acquire the title to the forty-five acres for the appellees, and that appellees should pay him for his services and disbursements in that behalf the sum of one thousand dollars; that he, Tedens, then and there paid appellant fifty dollars upon the agreement so made. Appellant admits that he met

Tedens at the office named on January 21st, and had a conversation with him about the forty-five acres; that Tedens asked him how much he wanted for getting the title for them to the forty-five acres, and he replied: "I did n't know how much it was going to cost, but proposed to make one thousand dollars clear." Appellant also admits that he received the fifty dollars, but claims that it was paid on account of the abstract he was going to make of the other lands, and not upon any agreement in reference to the forty-five acres. He says: "I told him [Tedens] I wanted fifty dollars to apply on it [the abstract], as I was going to spend considerable money,—as I was going out to see the Witts I wanted some money."

The conveyances from the Witt heirs to the appellant bear date February 2, 1885. After this, in the month of February, appellant had one conversation with Tedens, in which he said: "I am still fighting for you"; and another in which he said, in regard to the forty-five acres, that "he had n't it ready yet," that "he had n't it finished up yet," "it may take a suit yet to get it." Tedens states in regard to the latter interview: "I could not get much out of him at that time."

On February 24, 1885, appellant had another interview with appellees at Lemont, and they there paid him thirty dollars, and took the following receipt: —

"LEMONT, ILL., February 24, 1885.

"Rec'd from J. H. Tedens & Co., Lemont, Ill., thirty dollars for balance abstract-making.

"$30. J. G. VALLETTE."

This payment of thirty dollars was made in the store of appellees at Lemont, and the above receipt, with the exception of the word "balance" and the signature, was written by a clerk of appellees, who was directed to draw it up by appellee Tedens. As at first drawn, it read: "Rec'd from J. H. Tedens & Co., etc., thirty dollars for abstract-making." After the receipt was written, appellant inserted the word "balance" in such a way that its insertion was not noticed by Tedens. The purpose of putting in the word "balance" was evidently to confirm the theory that the fifty dollars paid on January 21st had been paid for abstract-making, and not upon an agreement to obtain the forty-five acres.

Upon his direct examination appellant's testimony in regard to this receipt is as follows: "This is the receipt for the thirty dollars that was given me at their office for the last cash balance on abstract. Is that receipt just exactly as it

was as you made it, as you signed it? Yes, sir. And was it made there in Mr. Tedens's presence? It was. Who wrote it? Their clerk. That is all his writing, is it? All except my signature." Upon his cross-examination appellant testifies as follows: "Do you say that Mr. Tedens was present when you received thirty dollars from his clerk? Yes, sir; because he went to the clerk himself and told him to pay it to me. Was he present when that receipt was signed for the thirty dollars? I don't know whether he was or not. Did you direct that word? I put that word in after it was written, that 'balance.' After the receipt was written you wrote that word 'balance' there yourself? Yes, sir, before I signed it. You do not know whether Mr. Tedens saw it or not? . . . . I don't know whether he saw it or not. . . . . You put the word 'balance' in there after it was written out and signed? I did," etc.

On February 28, 1885, the following letter was written to the appellant by the appellees: —

"LEMONT, ILL., Feb. 28, 1885.

"J. G. VALLETTE, ESQ.

"Yours at hand, and in reply can say that Peter Warden's address is Osburn City, Osburn County, Kansas. He lives within three miles of Osburn City, on a farm.

"I will be in Chicago next Tuesday; would like to have the abstract there then at Mr. Comstock's office.

"Yours respectfully, J. H. TEDENS."

The evidence tends to show, what has already been stated, that Walker had obtained his title to the one hundred acres, north of the channel, in the northeast quarter of section 15, from one of the Wardens, and it was supposed that he had also obtained from the same source the title to the forty-five acres in the northeast quarter of section 15 that lay south of the channel. The widow Warden was selling the timber upon the forty-five acres as far back as 1866, and at that time Tedens himself had drawn a contract between her and some other party in reference to the sale of such timber.

The letter of February 28th shows that on that day appellant was still acting for the appellees in reference to the matter of title. It also shows that having already obtained the interests of the Witt heirs in the forty-five acres, he was preparing to get whatever interests the Wardens might have. At this time appellees were ignorant that he had obtained for himself the title of the Witt heirs, and supposed that he was working to secure that title for them. He was not only concealing

from them the fact that he had procured the Witt interest, but he was making use of them, so as to obtain from them such information as would enable him to get hold of the Warden interest. They did not learn until they were so informed in April, 1885, by the county clerk of Du Page County, that the appellant had caused the conveyances of the forty-five acres to be made to himself, that he "had that property in his own name on record."

We forbear to refer further to the evidence. It is quite evident that appellant acted unfairly towards the appellees while sustaining to them a confidential relation. The facts in this case bring it within the rule laid down in *Davis* v. *Hamlin*, 108 Ill. 39.

Appellant was the county surveyor of Du Page County, elected to that office by the people. Appellees extended to him a confidence which they would not have felt but for his official position. By virtue of that position he came in contact with them, and while engaged in surveying their land, learned its situation and value, and became acquainted with their relations to the surrounding lands.

As a man experienced in the examination of titles and engaged in the business of making abstracts of title, he was intrusted with their valuable papers, and employed to ascertain whether there were any defects in their title. He undertook to help them collect their judgments by finding out what lands their judgment debtor owned, and what sort of title he had to the same. Persons engaged in the business of making abstracts of title occupy a relation of confidence towards those employing them, which is second only in the sacredness of its nature to the relation which a lawyer sustains to his client. Such persons consult the evidences of ownership and become familiar with the chains and histories of title. They handle private title papers, and become aware of whatever weaknesses or defects may exist in the legal proceedings, through which the ownership of real property is secured. They should be held to a strict responsibility in the exercise of the trust and confidence which are necessarily reposed in them. Any abuse of such trust and confidence should be met with emphatic rebuke.

Although it was shown upon investigation that Walker had no record title to the forty-five acres, yet he had been in possession of it for many years, and had exercised acts of ownership over it; appellees supposed him to be owner, and em-

ployed appellant to ascertain the nature of Walker's interest, not with a view to speculation, but for the purpose of subjecting that interest to the payment of honest debts. It was learned that in 1848 the canal trustees had sold the property to one Witt, who had died, and whose heirs had gone off and abandoned the land. Appellees desired and expected by the purchase of the Witt interest to realize something towards the payment of their judgments. Appellant undertook and agreed to act for them as their agent in obtaining that interest. But his employment in this regard grew out of and followed from his previous employment to examine the titles to this and other tracts, and to act for appellees in surveying land, in making abstracts of title, and in pointing out, with a view of correcting, defects in title. He was not simply an agent to purchase, as in *Perry* v. *McHenry*, 13 Ill. 227, but his agency to purchase was part of a broader agency, that concerned other matters and involved greater confidence and a more delicate trust.

Appellant's relations to appellees were of such a confidential character, and his conduct towards them was marked by such unfairness, that we feel justified in regarding him as a trustee holding the forty-five acres in question for their benefit. The circuit judge took this view, and we think the decree he rendered was correct.

The decree of the circuit court is accordingly affirmed.

Decree affirmed.

AGENT CANNOT MAKE PROFIT out of his principal, for whom he has undertaken to act: *Simons* v. *Vulcan Oil and Mining Co.*, 100 Am. Dec. 628, and note 636; and will not in equity be permitted to profit by his negligence toward his principal: *Mitchell* v. *Aten*, 1 Am. St. Rep. 231.

TRUST RESULTING TO PRINCIPAL IN LANDS bought by agent in his own name: *Rose* v. *Hayden*, 57 Am. Rep. 145.

RESULTING TRUST, when exists, and effect of: *Neill* v. *Keese*, 51 Am. Dec. 746, and extended note 751–760.

CASES

IN THE

SUPREME COURT

OF

MISSOURI.

LEWIS *v.* SCHWENN.

[93 MISSOURI, 26.]

PRESUMPTION OF PAYMENT OF DEBT FROM LAPSE OF TIME MAY BE OVERCOME by other facts and circumstances, for such presumption is rebuttable.

COURT CANNOT DICTATE ORDER IN WHICH PARTY SHALL PUT IN HIS EVIDENCE as to a question of fact.

QUESTION OF PRESUMPTION OF PAYMENT FROM LAPSE OF TIME IS ONE OF FACT AND LAW, and cannot be determined by the court until all the evidence upon the point is before it.

TEN YEARS' STATUTE OF LIMITATIONS WITH RESPECT TO PERSONAL ACTIONS APPLIES TO NOTE secured by mortgage, so as to prevent any judgment over, but as to the mortgage itself, and relief thereon, the ten years' statute with respect to real actions must be resorted to.

DEED OF TRUST OR MORTGAGE MAY BE ENFORCED AGAINST LAND by trustee's sale or foreclosure, although the note or bond secured thereby may be barred so that no action can be maintained thereon.

MORTGAGE IS AVAILABLE UNTIL THERE HAS BEEN TEN YEARS' ADVERSE POSSESSION, for the limitation affecting the recovery of real estate or the recovery of the possession thereof requires adverse possession to support it.

POSSESSION BY MORTGAGOR OR HIS GRANTEES IS NOT ADVERSE so long as payments of principal or interest are made, or the relation of mortgagor and mortgagee is recognized by both parties.

EJECTMENT. The opinion states the case.

E. P. Johnson, for the appellant.

J. W. McElhinney, for the respondents.

By Court, BLACK, J. The plaintiff, as public administrator, having in charge the estate of August Engler, brought this

suit of ejectment to recover a small parcel of land in St. Louis County. The cause was tried before the court without a jury, and resulted in a judgment for defendants, which was affirmed in the court of appeals.

It is agreed that J. Richard Barrett had a good title to the premises on the 25th of February, 1862. The plaintiff put in evidence a sheriff's deed, dated March 21, 1867, and recorded in the following June, conveying to said Engler all the right and title of Barrett in and to the premises in dispute. The defendants read in evidence a deed of trust made by Barrett to Kalb as trustee, dated February 25, 1862, and recorded the next day, to secure a note of one thousand dollars, signed by Barrett and payable to Sutton. The deed recites that the note was past due, and states that Sutton had extended the time of payment to January 1, 1863. The deed of trust contains the usual power of sale; also a deed by the trustee to B. N. Steinberger, dated August 7, 1878, and recorded in December, 1878. This deed was accompanied by proof that the property had been advertised for sale for the length of time and at the place specified in the deed of trust; also a deed from Steinberger to defendant, dated July 6, 1879.

The other evidence is not preserved, but the bill of exceptions states that plaintiff gave evidence tending to prove that, in the spring or early summer of 1867, August Engler took possession of the premises, claiming to own the same, and retained possession of them under such claim of title until the year 1875 or 1876, and then leased the same to Jacob Schwenn, father of the defendants; that Jacob Schwenn remained in the possession, as tenant of Engler, until July, 1879, when he gave up possession to defendants. The bill of exceptions also states that defendants offered evidence tending to prove that, in 1875 or 1876, Jacob Schwenn purchased the property from Engler by a verbal contract, and took possession under the contract, but never paid the purchase-money, and finally gave up possession to the defendants.

1. Plaintiff objected to the deed of trust and trustee's deed, when offered in evidence, on the ground that the debt had been paid, and on the ground that the deed of trust showed that the debt was more than ten years past due at the date of the trustee's sale, from which fact the law presumes the debt had been paid, and hence the sale was void, and passed no title. There is no evidence that the debt, in point of fact, had been paid, and we only have to deal with the alleged presump-

tion. This objection to the deeds as evidence was also renewed by way of an instruction. If the presumption of payment from lapse of time has any application to this case, still the objection to the deeds as evidence was properly overruled, for such a presumption is rebuttable. It may be overcome by other facts and circumstances: *Jackson* v. *Slater*, 5 Wend. 296. The court could not dictate the order in which defendants should put in their evidence as to this question of fact. Again, the question was one of fact and law, and could not be determined until the defendants' evidence was all before the court. The instruction is based upon the admission of a common source of title in Barrett, and the facts disclosed on the face of the deeds put in evidence. It does not state, hypothetically, that Engler was ever, at any time, by himself, or tenant, in the possession of the premises. In *Jackson* v. *Pierce*, 10 Johns. 413, the fact that the mortgaged premises were uncultivated for a part of the time was considered a circumstance to rebut the presumption of payment. In *Chouteau* v. *Burlando*, 20 Mo. 483, the court said: "There was no possession by the mortgagor, in the sense that is required in order to raise the presumption of satisfaction of the debts." That case, the case of *Cape Girardeau* v. *Harbison*, 58 Id. 90, and *McNair* v. *Lot*, 34 Id. 300, where the doctrine of presumption of satisfaction of a mortgage is discussed, all go upon the theory that the mortgagor, or those claiming under him, and claiming the benefit of the presumption, have had possession for the requisite period of time. The instruction did not state sufficient facts to raise the presumption, and was properly refused.

2. But if our statute of limitations applies to mortgages so as to bar a foreclosure, then there is no reason for resorting to presumptions at all. This question may be considered in connection with the second and third instructions asked by the plaintiff and refused by the court. The presumption of payment arising from possession and lapse of time was formerly resorted to for want of such a statute. Recent adjudications of this court hold that the statute applies to all civil actions, whether they be such as were formerly denominated legal or equitable: *Hunter* v. *Hunter*, 50 Mo. 445; *Rogers* v. *Brown*, 61 Id. 187; *Buren* v. *Buren*, 79 Id. 538. The ten-year statute with respect to real actions has been applied, as will be seen from the cases last cited, in suits to enforce trusts in real estate, and to set aside deeds because made in fraud of creditors. In the recent case of *Bush* v. *White*, 85 Id. 339, the

statute was applied in favor of a purchaser at a sheriff's sale, who had been in adverse possession of the premises for more than ten years, as against a prior mortgagee from the judgment debtor.

From these decisions, there can be no doubt but the statute does apply to mortgages. The question then is, Which statute applies,—that in relation to personal actions, or that in relation to real actions? Both operate as a bar in ten years. The suit to foreclose a mortgage is based upon a deed with a defeasance. The suit concerns land. Its object is to foreclose the equity of redemption. The fact that it is done now by decree and sale, and not by a strict foreclosure, does not change the nature of the suit. The ten-years' statute with respect to personal actions may apply to the note so as to prevent any judgment over, but as to the mortgage itself, and relief thereon, the ten-years' statute with respect to real actions must be resorted to. The mortgagee, after forfeiture, may recover the possession by ejectment without foreclosure, according to a number of decisions of this court. In such cases, it cannot be maintained that he would be barred short of ten years' adverse possession, and there is as much reason for applying that statute, in case the mortgage is sought to be foreclosed, as when the mortgagee seeks to get possession by ejectment. This result is consistent with the former adjudications of the court, in so far as they hold that though the note or bond secured may be barred so that no action can be maintained thereon, yet the mortgage may be enforced against the land by trustee's sale or foreclosure: *Chouteau* v. *Burlando*, *supra; Cape Girardeau Co.* v. *Harbison*, *supra; Wood* v. *Augustine*, 61 Mo. 46.

The mortgage will be available until there is ten years' adverse possession, for the limitation affecting the recovery of real estate, or the recovery of the possession thereof, requires adverse possession to support it. Possession by the mortgagor or his grantees will not be adverse so long as payments of principal or interest are made, or the relation of mortgagor and mortgagee is recognized by both parties. Now, in this case, there was evidence tending to show that Engler took possession in the summer or spring of 1867, and had such possession to 1875 or 1876, and that Jacob Schwenn then took possession, and held the same, either as tenant or vendee of Engler, to the date of sale in 1878, and thereafter to 1879. One difficulty with the second and third refused instructions is, that they do

not submit the question whether the possession was adverse to the mortgagee. Indeed, the bill of exceptions does not show that there was any such evidence; and, as we have seen, it does not follow that possession, under claim of title, is necessarily adverse to the mortgagee. There was no error in refusing these instructions, if there was evidence of the facts detailed in them, of which we are not advised.

No question is made here of the right of the administrator to prosecute this suit of ejectment, and his right to do so is assumed, not passed upon.

The judgment is affirmed.

On rehearing: —

RAY, J. Upon the motion for rehearing, filed in this cause, I have reconsidered my concurrence in the foregoing opinion, and now dissent from the same.

WHERE MORTGAGOR CONVEYS PREMISES TO THIRD PERSON, the grantee's possession will not be deemed adverse to the mortgagee unless there is an explicit disclaimer of holding under him, and assertion of title in the grantee brought home to him: *Whittington* v. *Flint*, 51 Am. Rep. 572; see also *Newman* v. *Chapman*, 14 Am. Dec. 766.

SUIT TO FORECLOSE MORTGAGE MAY BE MAINTAINED, although an action upon the accompanying note is barred by the statute of limitations: *Browne* v. *Browne*, 35 Am. Rep. 96; *Bizzell* v. *Nix*, 31 Id. 38, note 41; but see *Cunningham* v. *Hawkins*, 85 Am. Dec. 73, note 78, where cases on both sides of this question contained in that series are collected; *McCarthy* v. *White*, 82 Id. 754, note 757.

PRESUMPTION OF PAYMENT FROM LAPSE OF TIME: See *Smithpeter* v. *Ison*, 53 Am. Dec. 732, note 734, where other cases in that series are collected. Presumption of payment after lapse of twenty years is one of fact, and not of law: *Stover* v. *Duren*, 51 Id. 634. Such presumption may be rebutted by circumstances: *Wanmaker* v. *Van Buskirk*, 23 Id. 748.

FONTAINE *v.* HUDSON.

[93 MISSOURI, 62.]

THAT RECORDS OF COURT SHOULD BE SIGNED BY JUDGE IS NOT ESSENTIAL to their validity, in Missouri.

RIGHT TO EXECUTION FOLLOWS EO INSTANTI, UPON RENDITION OF JUDGMENT. The rendition of the judgment is the judicial act upon which the execution rests. Its entry upon the record is a mere ministerial act evidencing the judicial act, but not essential to its validity, or giving to the judgment any additional force or efficacy.

VALID JUDGMENT RENDERED WILL SUPPORT AND VALIDATE EXECUTION issued in conformity therewith, although the formal record evidence of

its rendition may not have existed at the time the execution issued. It is sufficient if the record evidence is in existence when proof of the judgment becomes necessary.

LEGAL TITLE TO LAND CANNOT BE TRIED IN SUIT TO REMOVE CLOUD from the title, and the plaintiffs in such suit asserting the legal title are not entitled to relief against the defendant claiming title as purchaser at a tax sale made under a judgment rendered in an action to which said plaintiffs were not made parties.

SUIT to quiet title. The opinion states the case.

E. T. Farrish, for the appellants.

M. Hilton, for the respondents.

By Court, BRACE, J. In an action commenced in the circuit court of the city of St. Louis to the October term, 1881, thereof, in which the state of Missouri, at the relation of Nathaniel C. Hudson, collector of said city, was plaintiff, and the "unknown heirs of Mary O. Smith" were defendants, for the recovery of delinquent taxes for the year 1879, due on lot 98, in block 31, in North St. Louis Addition, the plaintiff, on the 22d of March, 1882, recovered judgment for the amount of taxes found to be due thereon for the year 1879, and costs; on the 7th of April, 1882, special execution was issued on said judgment, by virtue of which the sheriff, on the 22d of May following, sold said real estate to Mary Wing for the sum of $518. The said Mary Wing received the sheriff's deed for said real estate, and thereafter conveyed the same to Mary E. Tanner, who, on the 10th of June, 1882, gave a deed of trust on said real estate to John W. Collins, and thereafter made conveyances of said real estate to Anna M. Hilton. On the 5th of April, 1883, the present action was instituted in said circuit court by the plaintiffs, Lamar Fontaine, and Lemuella S. Fontaine, his wife, Mary A. Brickell, W. S. Reid, John W. Reid, and M. M. Puroyer, against the defendants, the said Nathaniel C. Hudson, collector, Mary Wing, Mary E. Tanner, John W. Collins, and Anna M. Hilton, and Mathew Hilton, husband of said Anna M., in which the plaintiffs claim that they are and were at the date of the institution of said back-tax suit the owners of said real estate, but were not made parties thereto, and had no notice thereof, and by which they seek to have set aside and canceled the judgment rendered in said suit, the sale made by the sheriff thereunder, the sheriff's deed to Mary Wing, and the subsequent conveyances to the other defendants, for the reason that the same are a cloud upon the title

of plaintiffs to said property. The defendants, in their answer, denied generally the allegations of the petition; the case was submitted to the court on the evidence introduced by plaintiff, the defendants offering none; and upon the hearing, the plaintiffs' bill was dismissed and judgment rendered against them for costs, from which they appeal, assigning for error that the judgment was against the law and the evidence in the case. The material facts disclosed by plaintiff's evi dence, as it appears in the record before us, are substantially as follows:—

W. C. Jamison testified that in the year 1844 or 1845, M. C. Cheatem, who, with H. B. Brickell, were trustees of the property in controversy, under a conveyance made by Mary O. Smith in 1843, employed him to look after the lot and pay the taxes on it; that for a time Mr. Cheatem sent him the money to pay the taxes; that for some years he continued to pay the taxes on it, till finally he leased it to Messrs. Schulenberg and Boeckler for the taxes; that he rented it to them between 1850 and 1860, they agreeing to pay the taxes; that thereafter he gave the matter no further attention, except that once he tried to sell the lot, and drew a deed conveying the same, which deed was signed by M. C. Cheatem and H. B. Brickell as grantors; that in all he did he acted for Cheatem, and knew no one else represented or interested in the lot; that it was assessed in the name of M. C. Cheatem from 1862 down to and including 1879, and after that, in 1880, 1881, and 1882, to Lamar Fontaine.

Charles W. Behrens testified that he was secretary of the Schulenberg and Boeckler Lumber Company; that he has known the property in question for fifteen or sixteen years; that it was used by and in the possession of A. Boeckler & Co., then of Schulenberg and Boeckler, and then of the Schulenberg and Boeckler Lumber Company; that these parties used said lot in connection with their mill, and for piling lumber; that they had always paid the taxes, except for 1879.

A. Boeckler testified that he was president of the Schulenberg and Boeckler Lumber Company; that that company succeeded to the business of Schulenberg and Boeckler; that Brotherton and Dryden first had possession of the lot from 1858 to 1864; that they were succeeded in the possession by Dryden, Overstoltz, & Co., in 1864, and they by A. Boeckler & Co., in 1869; and the latter concern afterwards by Schulen-

berg and Boeckler, and they by the lumber company; that from 1864 to 1869 the lot was rented, the occupants agreeing to pay the taxes as rent; that in 1869, A. Boeckler & Co. took it, and continued holding and using the same as their predecessors, and ever since the successors aforesaid of A. Boeckler & Co. have continued to hold and use the lot; that the lumber company and their predecessors had always paid the taxes, except those of 1879, which were overlooked; and on cross-examination, this witness testified: "We never had a lease from Cheatem; knew that Jamison had control of the lot; never had a contract with Jamison or Cheatem directly. We took possession and paid the taxes; it was so done by Dryden, Overstoltz, & Co., and we stepped in their shoes. I never saw or heard of Mary O. Smith before the tax sale, nor of the plaintiffs in this suit."

It was further shown by plaintiffs in evidence that Mary O. Smith died in May, 1868, leaving as her heirs two daughters, Mrs. E. Brickell and Mrs. Bethunia E. Cheatem, wife of M. C. Cheatem, and a granddaughter, Mrs. Elizabeth House; that Mrs. House died on the twenty-third day of August, 1868, without issue, leaving as her heirs her father, W. S. Reid, her half-brother, J. W. Reid, and her half-sister, M. M. Puroyer, plaintiffs herein; that Mrs. E. Brickell died on the third day of July, 1877, leaving Mary A. Brickell, Lemuella S. Fontaine, plaintiffs herein, and Agnes Miller, her heirs at law; that M. C. Cheatem died in November, 1873, and Mrs. Bethunia C. Cheatem died on the twenty-seventh day of December, 1879, leaving as her heirs Agnes S. Perkins, Sallie P. Cheatem, Margaret C. Barksdale, and N. P. S. Cheatem.

The action of the court in excluding the deeds offered in evidence from some of the heirs at law of Mary O. Smith, who are not, to some of those who are, plaintiffs in the cause, not having been complained of in the motion for a new trial, is not before us for review. The foregoing oral testimony is the only evidence in the record tending to show that plaintiffs had title to or possession of the aforesaid lot 98 at the time this suit was instituted. In the petition in the back-tax suit, it was alleged that the defendants, "the unknown heirs of Mary O. Smith, are the owners of said real estate by descent, and that their names and places of residence cannot be inserted herein, because they are unknown to plaintiff." The order of publication followed the petition; it was shown by the deputy clerk that the judgment therein was not written up until De-

cember 17, 1882; that the only minutes kept of the proceedings were the memoranda indorsed on the papers and kept in the minute-book, and that the record of the proceedings of the court in the back-tax cases was never signed by any of the judges. In regard to this last evidence, it is only necessary to say that it is not essential to the validity of records of courts in this state that they should be signed by the judges: *Platte County* v. *Marshall*, 10 Mo. 346; and that the party in whose favor any judgment is rendered may have execution in conformity therewith: R. S. 1879, sec. 2335; that the right to the execution follows, *eo instanti*, upon the rendition of the judgment; the rendition of the judgment is the judicial act upon which the execution rests, its entry upon the record is a mere ministerial act evidencing the judicial act, but not essential to its validity, or giving to the judgment any additional force or efficacy. A valid judgment rendered will support and validate an execution issued in conformity therewith, although the formal record evidence of its rendition may not have been in existence at the time the execution issued. It is sufficient if the record evidence is in existence when proof of the judgment becomes necessary.

This baseless attack on the execution in the back-tax suit being eliminated, we may now enter upon a consideration of the real case presented in the pleadings and evidence. With this excision, the case presented in plaintiff's petition is, that plaintiffs are the owners of, i. e., hold the legal title to, the lot in question; that they are in possession of the same, and that the defendants have spread upon the public records conveyances purporting to vest in certain of the defendants the legal title to said lot under a judgment, execution, sale, and sheriff's deed, which are invalid for the reason that the plaintiffs, the owners of said lot, were not made parties to the suit in which such judgment was rendered. The fact that the plaintiffs were not made parties to the suit could not, *per se*, in any way vitiate or affect the validity of the judgment, or give them any show of right to have it canceled; if they had been made parties to the suit, and an invalid judgment had been rendered therein, or if upon the face of the proceedings it appeared that they had been made parties to the suit, when, in fact, they had not been, then a case would have been made calling for the interposition of a court of equity to avoid the judgment, and to declare that that muniment of title which upon its face appeared to be a verity was in point of fact a

falsity, and therefore a nullity. If, however, plaintiffs were not made parties to the suit in which the judgment was rendered, their interest in the property was in no way affected by it, although the judgment may have been good enough in itself, valid and binding on those made parties, and duly served, if any such there were. As to plaintiffs, it was an absolute nullity on its face, could cast no cloud upon their title, and afforded no ground for an action by them to set aside such judgment, or declare it void.

The case, presented in this way, shows that this proceeding is an attempt, under the guise of a bill in equity to remove a cloud, to try the legal title to the premises. If plaintiffs have any title at all to the premises, it is a legal title; if defendants have any title, it is a legal title, apparent upon the face of the record. The only question to be determined is, Which has the paramount legal title? The case presents no feature calling for the interposition of the extraordinary power of a court of equity. It is not even averred in the petition nor is there any evidence tending to show that defendants ever have or are asserting any claim or title to the premises, and for all that appears in this record, they may make no claim to the property. At all events, the law has placed at the service of plaintiffs an action, if they are in possession as they claim, by which they could ascertain that fact, and by which the defendants could be required, if they made any such claim, to assert it in an action of ejectment, or forever after hold their peace; and if they made none, to make such a disclaimer without costs as would put plaintiff's title as to them forever at rest. This was the action that plaintiffs, if in possession, ought to have resorted to; for, whilst this action does not supersede the equitable action to remove a cloud from title in cases properly calling for the exercise of equitable jurisdiction, it is the only one that plaintiffs show themselves entitled to upon the facts stated in their petition.

But could it be conceded that the legal title to the premises could be tried in this equitable proceeding, it is not perceived how plaintiff's action could be maintained on the evidence in the case. It will be observed that plaintiffs, to show title in themselves, simply trace the relationship between themselves and Mary O. Smith, and if they have shown any title at all to the premises, it is such title as they have acquired by

descent from Mary O. Smith. If she had no title, then plaintiffs have none, and there is not a *scintilla* of evidence tending to show that Mary O. Smith ever had any title to the lot, and in this connection it may be remarked that, upon the case made solely by the plaintiffs (for the defendants claimed nothing and proved nothing), if Mary O. Smith had no title, "her unknown heirs by descent" had none. Defendants acquired none under the tax sale and sheriff's deed, and the alleged cloud is in the sky,—this whole litigation *in nubibus;* nor have the plaintiffs succeeded in bringing it to earth by showing possession of the premises. There is no evidence tending to show that Mary O. Smith or plaintiffs, who claim under her, have ever been in possession. On the contrary, it appears from the evidence that for more than twenty-five years prior and up to the time of the institution of this suit, the lot had been in the actual and continuous possession of parties not holding under Mary O. Smith or either of the plaintiffs herein, but who, if they were tenants of anybody, were tenants of M. C. Cheatem or of M. C. Cheatem and H. B. Brickell, and there is nothing in the evidence tending to show that in the letting of the lot to the first occupants by Jamison, the agent of Brickell and Cheatem, which is the only letting shown that either he or they were acting for or on behalf of Mary O. Smith. On the contrary, Jamison testifies that he acted for Cheatem only, and knew no one else as having an interest in the lot, and Mr. Boeckler, who was a member of all the firms and president of the corporation in possession of the lot for twenty years before this suit was brought, testified that he never heard of Mary O. Smith nor of the plaintiffs in this suit before the tax sale; and to further negative the idea that Cheatem, in this letting, was acting for Mary O. Smith, it is shown that prior thereto she had conveyed her legal title, if any she had, to Cheatem and Brickell in trust, but upon what trust does not appear, and that they, after such conveyance, asserted title in themselves by signing a deed to the property as grantors, in view of a contemplated sale by their agent. The plaintiffs having failed to show either title to or possession of the premises were not in position to attack the proceedings in the back-tax suit in any form of proceedings, either legal or equitable, and their bill was properly dismissed.

The judgment of the circuit court is affirmed.

EXECUTIONS ARE NOT VOID THAT HAVE BEEN ISSUED according to the established course of practice, and are not so erroneous that they cannot be amended: *Hunt* v. *Loucks*, 99 Am. Dec. 404, note 412.

AWARD OF EXECUTION IS JUDICIAL NOT MINISTERIAL ACT: See *Johnson* v. *Ball*, 24 Am. Dec. 451, note 454.

EXECUTION AS ISSUED MUST BE WARRANTED BY JUDGMENT: See *Blanks* v. *Rector*, 88 Am. Dec. 780, note 782.

POWER OF COURT TO AMEND ITS RECORDS: See *McCormick* v. *Wheeler*, 85 Am. Dec. 388, note 396, where other cases in that series are collected.

BILL TO REMOVE CLOUD ON TITLE LIES WHEN: See *Scott* v. *Onderdonk*, 67 Am. Dec. 106, note 110.

RECORD OF COURT IS ITS MINUTES, READ, CORRECTED, AND SIGNED BY COURT: *Dennis* v. *Heath*, 49 Am. Dec. 51, note 53.

McGARRY *v.* LEWIS COAL COMPANY.

[93 MISSOURI, 237.]

SERVICE OF PROCESS OF GARNISHMENT DOES NOT CREATE SPECIFIC LIEN in favor of the plaintiff upon the property of the defendant in the hands of the garnishee.

ACTION for conversion. The opinion states the case.

Martin, Laughlin, and Kern, for the appellant.

Given Campbell, for the respondent.

By Court, RAY, J. This is an action by plaintiff against defendant for damages in the sum of five thousand dollars, for the conversion of a steam-tug called the Alice Parker. A general demurrer was sustained to the petition, and final judgment entered thereon in favor of the defendant, from which plaintiff has appealed. The petition charges, substantially, that, on the 7th of March, 1877, judgment against Thomas Parker was rendered in the St. Louis circuit court in favor of Henry D. Laughlin in the sum of $2,250, and interest and costs; that, on the 19th of September, 1878, said judgment was assigned to the plaintiff for value; that, on the 18th of January, 1879, an *alias* execution was sued out, in due form of law, returnable to the February term, 1879, and delivered to the sheriff of the city of St. Louis; that, under directions of plaintiff, the sheriff, in due form of law, summoned one Thomas Parker, Jr., as garnishee of Thomas Parker, defendant in the execution; that, in obedience to the summons, said garnishee appeared at the return term of the writ to answer interrogatories relating to his indebtedness to the defendant in the execution; that the

sheriff, at the same time, did declare, in writing, to said garnishee, of which he made full return, that he attached in his hands (and summoned him as garnishee concerning) any goods, chattels, moneys, or evidences of debt which he might have belonging to said judgment debtor; that interrogatories were exhibited, and that said garnishee, in his answer, did not truly answer as to property and effects in his hands; that plaintiff, in his reply to said answer, alleged that said garnishee had in his possession, and under his control, the steam-tug called the Alice Parker, and that said tug was the property of the defendant in said execution, and that it was of the value of three thousand five hundred dollars; that the issues raised in said garnishment proceedings were referred to John A. Harrison, Esq., as referee, to try the issues and report to the court his findings and decision; that, upon the pleadings and proofs submitted by both sides, the said referee made his report, and filed the same on the 1st of November, 1883; that, in his said report, said referee found in favor of plaintiff, and against said garnishee, to the effect that, at the service of said garnishment, said garnishee had in his possession said tug, and that it was the property of Thomas Parker, defendant to this execution; that said report was confirmed by the court, and that the court, on the eighteenth day of January, 1884, made and entered an order on said garnishee requiring him to deliver said steam-tug to the sheriff on or before Monday, February —, 1884; that, on the 29th of January, 1884, said order was duly exhibited to said garnishee, and that he failed to comply with the same, or to deliver to the sheriff as commanded; that, by reason of the premises, plaintiff acquired a lien upon said steam-tug in the hands of said garnishee; that, before his said lien was established by the judgment of the court, to wit, on the eighth day of January, 1880, the defendant received said steam-tug into its possession, and converted the same to its own use to plaintiff's damage in the sum of five thousand dollars, for which judgment is prayed.

It will be observed that no notice or knowledge of said garnishment by this defendant is charged, nor is any collusion alleged. Briefly, then, the question thus presented by the record is, whether plaintiff, as assignee for value of said judgment in favor of Laughlin against Thomas Parker, had, by said process of garnishment against said Thomas Parker, Jr., upon *alias* execution under said judgment, acquired a valid lien upon the said steam-tug Alice Parker. A lien of this sort

is unknown to common law; and the question then is, whether our statute creates a specific lien upon the property under and by virtue of the service of the process of garnishment. In sustaining the demurrer, the trial court must have held that no such lien existed; and in this view of the law we concur. None of the various provisions in our statute give in terms any such lien; and it is, we think, obvious that the responsibility of the garnishee (at least until an order of court is made in the cause to turn over the property) is given and substituted in lieu of such lien. No provision has been pointed out prohibiting the garnishee, upon the mere service of the garnishment process, from disposing of the property; but on the other hand, various sections on the subject look to rendering the garnishee personally liable for misappropriation, or failure to produce the property to satisfy the judgment which may be rendered in the cause.

In general, it may be said that garnishment is a proceeding especially designed for the attachments of credits or debts due the defendant; and while it may be employed with respect to tangible and specific property in the possession of a person other than the debtor, it is in these respects resorted to in order to avoid the responsibilities incident to the actual seizure and custody of the property. Often it is uncertain whether the third person has in his possession any property belonging to the defendant; or it may belong to the defendant with the right of possession in such third person. Garnishment is, as the term implies, a warning to the garnishee not to dispose of the property of the defendant in his hands, and that if he does so dispose of the same, he will subject himself to personal liability for the value to the extent at least of the plaintiff's debt or claim.

Ordinarily, property is not deemed to be in the custody of the law until actually seized and reduced into possession by the officer. Under the law applicable to attachments, it is the levy by the officer that creates the lien. If the plaintiff is not satisfied to look to the responsibility of the garnishee, he may apply to the court, or to the judge in vacation, and obtain an order upon the garnishee to deliver the property to the sheriff or into court, or the court may permit the garnishee to retain the property upon the execution of a bond to plaintiff with security: R. S. 1879, sec. 2524; *Bank of Missouri* v. *Bredow*, 31 Mo. 523. These provisions seem to have been regarded as affording ample protection.

In considering the subject of garnishment, Mr. Wade, in his work on attachments, observes that "it differs from attachments by seizure in two important particulars: 1. Its validity does not depend on the officer's taking possession; 2. It creates no specific lien upon the defendant's property in favor of the plaintiff": 2 Wade on Attachment, sec. 325. And again, he says: "It may also be less satisfactory to the plaintiff for the reason that instead of the specific lien the responsibility of the garnishee is substituted": Id. Drake on Attachment announces a similar view, in language as follows: "Garnishment is an effectual attachment of the effects of the defendant in the garnishee's hands, differing in no essential respect from attachment by levy, except, as is said, that the plaintiff does not acquire a clear and full lien upon the specific property in the garnishee's possession, but only such a lien as gives him the right to hold the garnishee personally liable for it or its value": Drake on Attachment, 4th ed., sec. 453.

In *Bigelow* v. *Andress*, 31 Ill. 322, the court say that "by the service of the garnishee process there can be no pretense that the property is in any sense transferred to the officer, or that he thereby acquires any right to control it. The garnishee still has the right to retain it, and by the service only becomes liable to account for it, or its proceeds, if judgment shall be rendered against him on the trial. The statute does not prohibit him from disposing of it, but only renders him liable on failing to produce it to satisfy the judgment." See also, to same effect, *Walcott* v. *Keith*, 22 N. H. 196. The authorities cited by appellant take the opposite view of the question, but some of them are based on local statutes essentially different from that of ours. The weight of authority, however, is, we think, decidedly in favor of the views herein expressed.

For these reasons, and upon these authorities, the demurrer to the petition was, we think, properly sustained. This leads to an affirmance of the judgment, in which all concur.

Attachment Creditor has Specific Lien when: See *Rinchey* v. *Stryker*, 84 Am. Dec. 324, note 329.

Service of Garnishment on Debtor of Defendant Creates Lien on the debt for the satisfaction of the demand, which cannot be divested by any arrangement between the defendant and the garnishee: *Cottrell* v. *Varnum*, 39 Am. Dec. 323.

STATE TO THE USE OF GARESCHE v. SLEVIN.

[96 MISSOURI, 253.]

WARD, AFTER ATTAINING HIS MAJORITY, CAN MAINTAIN SUIT AGAINST SURETIES on the bond of his guardian without making him a party, and before his liability has been ascertained by a final settlement of his accounts. And this rule is not changed by the enactment of a law making provision for forcing an administrator to make final settlement.

RIGHT OF WARD TO SUE ON BOND OF HIS GUARDIAN is not affected by statute which provides that if the guardian fails to pay to his ward money ordered on final settlement to be paid to him, summary proceedings may be taken against him to compel such payment. The remedy thus provided is cumulative, but not exclusive.

WHERE GUARDIAN IS NON-RESIDENT OF STATE, SUIT MAY BE BROUGHT AGAINST SURETIES on his bond without making him a party.

WHETHER GUARDIAN HAS BEEN RECKLESS AND INJUDICIOUS IN LOANING the money of his ward, and in taking security for it, is a question of fact to be determined by the evidence, under proper instructions.

GUARDIAN AND HIS SURETIES ARE NOT RESPONSIBLE FOR LOSS OCCASIONED BY LOAN of his ward's money, where he acted in good faith and with ordinary care and prudence in making the loan, and he fully believed that the security accepted by him was amply sufficient to secure the same.

IF LAND ACCEPTED BY GUARDIAN AS SECURITY FOR LOAN OF HIS WARD'S MONEY WAS SUFFICIENT to properly secure the same at the time it was taken, the guardian and his sureties will not be responsible for any loss that may be occasioned by a subsequent depreciation in the value of the land.

GUARDIAN WILL NOT BE ALLOWED FOR SUPPORT OF HIS WARD when, at the time he took him into his family and furnished the support, he had no intention of charging therefor.

ACTION on a guardian's bond. The opinion states the case.

E. C. Slevin and A. J. P. Garesche, for the appellants.

J. L. Hornsby, for the respondent.

By Court, NORTON, C. J. This suit was instituted in the circuit court of the city of St. Louis to recover damages occasioned by an alleged breach of a guardian's bond. It is averred in the petition that, in 1871, John F. Slevin was appointed by the probate court of St. Louis County guardian of the person and estate of Louis Garesche, then a minor about fifteen years old; that said Slevin made and executed his bond, with defendants Charles Slevin and Alexander J. P. Garesche as sureties, with the condition that if the said John F. Slevin should well, truly, and faithfully discharge the duties of his office as guardian, according to law, the bond should be void, otherwise to be in full force. As a breach of the bond, it is averred that on the 1st of June, 1875, said

guardian loaned to John Slevin and T. E. Slevin four thousand dollars of the estate of his ward, Louis Garesche, took their note therefor, payable two years after date, and to secure the same took from them a mortgage on a tract of land in Williamson County, Illinois, particularly described in the petition. It is further averred that at the same time said guardian also lent to the same parties, on the same security, four thousand five hundred dollars belonging to the estate of Adèle Garesche, who was also his ward; that he made report of these loans to the probate court, and represented these lands, taken as security for said loans, to be worth ten thousand dollars, when in fact the land was only worth two thousand dollars.

It is further averred that plaintiff and said Adèle Garesche, in 1882, filed a bill to foreclose said mortgage; that it was foreclosed and the land was sold for four thousand six hundred dollars; and that said plaintiff's share of the proceeds of said sale was two thousand dollars. It is also averred that said John and T. E. Slevin became bankrupts in 1876; that John has died, leaving no estate, and said T. E. Slevin was insolvent. It is then averred that said investment of plaintiff's money was reckless and injudicious, and that, by reason thereof, he has been damaged four thousand dollars.

The answer of defendants Charles Slevin and Garesche admits the appointment of John F. Slevin as guardian, and the execution of the bond sued on, as alleged; admits that said Slevin loaned four thousand dollars of his ward's money and secured the same by mortgage, as stated in the petition, but denies that the loan was made to John and Thomas E. Slevin, and avers that it was made to J. and J. Slevin and Sons of Cincinnati. The answer denies that the investment of the ward's money was reckless or injudicious, and avers that, at the time of said loan, the said guardian truthfully and correctly represented the value of said land to the probate court, and that the security received was ample and sufficient to secure said investment, and that in making the loan the guardian acted in good faith. It is further claimed that, there having been no final settlement, credit should be given the guardian for the ward's board and lodging from March, 1871, to the date of his majority, and that it was reasonably worth twenty-five dollars per month. The matters set up in the answer were denied by replication.

It appearing that defendant John Slevin was not served

with process, the suit was dismissed as to him, and the trial was proceeded with against the securities in which plaintiff obtained judgment, from which defendants have appealed, and seek a reversal on various grounds, the first of which, stripped of all redundancy, is, that a ward who has obtained his majority cannot maintain a suit against the securities on the bond of the guardian, without making such guardian a party, nor until final settlement has been made by the guardian, and his liability thereby ascertained. It is mutually conceded in the briefs of counsel that the above contention cannot be sustained, under the rulings of this court in the cases of *Devore* v. *Pitman*, 3 Mo. 180, and *Oldham* v. *Trimble*, 15 Id. 225. In the first of these cases, it is said that an administration bond is joint and several, and may be put in suit by any person aggrieved against one or all of the obligors, and that the surety may be sued as soon as the principal commits a breach of the condition of the bond, and that no conviction, by verdict or judgment, is necessary. In the second case, it is said: "It has been long settled in this state that an action on an administration bond may be instituted against a security before any indebtedness has been previously established, or any judgment obtained against the administrator. This rule, though contrary to that which has been established in some other states, has been too long established now to be overturned. No distinction can be maintained between an administrator and curator."

It is, however, insisted that the act of 1883 (Acts 1883, p. 23), which requires executors and administrators to make final settlement after the expiration of two years from the date of the publication of notice of the grant of letters, and provides a method of procedure against them in the event of their failure to make such settlement, has modified or changed the rule announced in the above cases. We cannot perceive that it has any such effect. In the said cases, it is not given as a reason for the rule that the law, at that time, made no provision for forcing an administrator to make final settlement, but the reason given is, that an administrator's bond is a joint and several obligation, and being such, suit can be brought against any one or all the obligors.

Nor is the question, as is contended, affected by Revised Statutes, section 2612, which provides that if a guardian fails to pay to his ward money ordered on final settlement to be paid to him, the same proceedings may be had against his guardian

and sureties as are authorized when an executor or administrator fails, when ordered, to pay demands against an estate. When an executor or administrator fails to pay demands against the estate, which he has been ordered to pay, it is provided by Revised Statutes, section 235, if he fail to pay when payment is demanded, the clerk of the court, on application of the creditor, and being satisfied that such demand has been made, shall issue execution against the property, goods, chattels, and real estate of such executor or administrator. And by section 236, it is provided that if any such execution be returned unsatisfied, the creditor may sue out a *scire facias* against any one or more of the securities of such executor or administrator, referring to the bond, the order of payment, the execution and return, and requiring such security to show cause why judgment should not be rendered against him for the amount ordered to be paid, and still unsatisfied.

These sections of the statute simply provide a summary remedy for enforcing the payment of a demand ordered to be paid, which the party interested may or may not avail himself of, but they in no way deny to him the right of suit on the bond. The remedy thus provided is cumulative, but not exclusive, and, by the terms of section 2612, can only be resorted to by the ward when, on final settlement, the guardian has been ordered to pay. Besides this, the fact stated in plaintiff's abstract, that it appeared in evidence that Slevin, the guardian, was a non-resident of the state, which fact was not disputed in the oral argument, nor is it disputed in the abstract or brief of counsel, authorized a suit on the bond against the sureties even in the states where the principal is ordinarily held to be a necessary party: Brandt on Suretyship, sec. 495; *Commonwealth* v. *Wenrick*, 8 Watts, 159.

The question as to whether the guardian was or was not reckless and injudicious in making the loan, and in taking the mortgage to secure it, was one of fact, to be determined by the evidence, under proper instructions, and this question, we think, was fairly submitted to the jury in the following instructions: —

"1. If John Slevin, guardian, in loaning the moneys of his ward, acted in good faith and with ordinary care and prudence, and if he fully believed that the security accepted by him was ample and sufficient to secure said loan, then he and his sureties are in no wise responsible for any loss which may have been occasioned by such loan.

"2. If at the time the mortgage read in evidence was executed the land accepted by the guardian as security was sufficient properly to secure the same, then, although the same may have since depreciated in value, and though upon a sale of the security it did not realize enough to pay the said loan, the said John F. Slevin and his securities are not responsible for any loss that may have been occasioned to relator by such depreciation or sale."

As the answer admits that the four thousand dollars in question loaned by the guardian belonged to the estate of the ward, no question of the non-liability of the securities for a pre-existing debt of the guardian can arise in the case.

It is further insisted that, under the evidence, defendants should have been allowed for the board and lodging of plaintiff by the guardian. The only evidence upon that subject was that of the guardian himself, who testified that his wife, then deceased, was a sister of Mrs. Garesche, the mother of the plaintiff, and that before Mrs. Garesche died she requested him to take care of her children after her death. He further testified as follows: "Accordingly, after her death, they came to my house and lived there during their minority; the relator herein lived with me from March 6, 1871, until his majority, about five years and four months. I never charged him, or any of my wards, for their board or lodging. I think twenty-five dollars per month would be a very reasonable charge for said board and lodging. I did not intend to charge them for their board and lodging, for I thought I was sufficiently able to provide for them as for my own children, but I never told them I would not charge anything. Had I supposed my sureties would ever have to pay my indebtedness to the relator, I would certainly have charged him for his board and lodging. The Garesche children, while living with me, were treated as members of my family."

The only question arising on this evidence is as to the correctness of the following instruction given by the court of its own motion: —

"3. If Louis Garesche boarded and lodged with his guardian, John F. Slevin, during the time of such guardianship, from —— to ——, then whatever would be a reasonable compensation for the same, the securities of said John F. Slevin, on said guardian's bond, are entitled to as a credit in this cause; provided, said guardian furnished said board intending at the time to charge therefor, and if he did not so intend,

he cannot at this time claim such credit, nor can his sureties make such claim."

This instruction, under the evidence, was fully warranted by the case of *Folger* v. *Heidel*, 60 Mo. 288, in which it is said: "It is not believed that a case can be found where a parent, or any one standing *in loco parentis*, has been allowed to charge an infant, where he took it and raised it as a member of his family without any intention or design of charging for its support."

Finding nothing in the record justifying an interference with the judgment, it is hereby affirmed.

DUTIES AND LIABILITIES OF GUARDIANS: See *State* v. *Gooch*, 2 Am. St. Rep. 284, note 287, where other cases are collected.

GUARDIAN INVESTING WARD'S MONEY, WHEN LIABLE FOR LOSS AND WHEN NOT: See *Slauter* v. *Favorite*, 57 Am. Rep. 106, note 111; *Persley* v. *Martin*, 46 Id. 733; *Barney* v. *Parsons*, 41 Id. 858; *State* v. *Sanders*, 30 Id. 203; *Coffin* v. *Bramlitt*, 97 Am. Dec. 449, note 454, where other cases in that series are collected.

GUARDIAN, WHEN ALLOWED FOR WARD'S SUPPORT AND WHEN NOT: See *In re Besonby*, 50 Am. Rep. 579; *McLane* v. *Curran*, 43 Id. 535; *Guion* v. *Guion*, 57 Am. Dec. 223, note 227, where this subject is considered.

SUITS ON GUARDIAN'S BONDS: See note to *Commonwealth* v. *Stub*, 51 Am. Dec. 534.

NANSON *v.* JACOB.

[93 MISSOURI, 331.]

MERE BAILEE, WHETHER COMMON CARRIER OR OTHERWISE, IS NOT GUILTY OF CONVERSION, though he receive property from one not rightfully entitled to possession, and, acting as a mere conduit, deliver it in pursuance of the bailment, if this be done before he has notice of the rights of the real owner. But if he has such notice, his *status* is altered, and he delivers possession at his peril.

SECTION 1016, REVISED STATUTES OF MISSOURI, DOES NOT APPLY TO ACTIONS OF TROVER AND CONVERSION, nor was it intended to apply to common carriers.

ALLOWANCE OF DEMAND BY ASSIGNEE FOR BENEFIT OF CREDITORS IS JUDGMENT to all intents and purposes, and is appealable from, and conclusive as such.

PERSON ENTITLED TO ELECTION BETWEEN INCONSISTENT REMEDIES WILL BE CONFINED TO ONE which he first prefers and adopts.

WHERE ANSWER DENIES ASSIGNMENT OF CAUSE OF ACTION TO PLAINTIFF, and that he is the real party in interest, it is error to exclude evidence offered in support of the issue so tendered.

TROVER. The opinion states the case.

Albert Arnstein, for the appellants.

S. M. Breckenridge and M. F. Watts, for the respondents.

By Court, SHERWOOD, J. Action in trover, brought against Robert Jacob, the St. Louis Transfer Company, and the Wabash, St. Louis, and Pacific Railway Company, for the alleged conversion of a number of bales of hops, the property of plaintiffs' assignors.

The petition states, in substance, that S. and F. Uhlmann were, on the sixteenth day of December, 1879, the owners and in possession of a certain number of bales of hops; that on that day they casually lost the same out of their possession; that on the same day they came into the possession, by finding, of defendants, who refused to deliver them to said S. and F. Uhlmann, but converted the same to their own use; that after the said cause of action accrued in favor of the said Uhlmanns, they did, on the fifteenth day of January, 1880, assign the same to plaintiffs. The defendants answered separately, the defendant Jacob denying all the allegations of the petition, and alleging as his defense, in substance, that he had bought the hops of the Uhlmanns; that after the purchase, he made an assignment for the benefit of his creditors; that plaintiffs, claiming to be the assignees of Uhlmanns in the contract of sale of the hops, accepted the provisions of the assignment, and proved up their claim before the assignee, and in payment of the claims the assignee had transferred to plaintiff certain claims and choses in action; that the assignee had paid part of the claim in money; and the administration of the effects of his estate was not yet closed.

The defendant, the St. Louis Transfer Company, denied all the allegations of the petition, and alleged that it was a common carrier, engaged in the transportation, by wagons, of freight from East St. Louis to St. Louis; that on the day of the alleged conversion, defendant Jacob represented to it that he had three carloads of hops in East St. Louis, which he desired this defendant to bring for him to the city of St. Louis, and at the same time showing this defendant written and printed notices from the defendant railway company to him, notifying him of the arrival of the hops in East St. Louis, consigned to him, and requiring him to call and remove the same; that thereupon this defendant agreed with Jacob, for a certain price, to bring the hops for him to St. Louis; that Jacob indorsed his order on said notices from the railway company,

requesting the railway company to deliver the hops to this defendant; that said notices disclosed no claim of any other person to said hops, and, on the contrary thereof, warned defendant Jacob that unless said hops were removed within the time by the notices indicated, i. e., twenty-four hours, he would be required to pay a penalty for delay, in the shape of an increased charge to the carrier,—the railroad company,—for warehouse fees; that upon presentation of this order of defendant Jacob to the railway company, the hops were delivered to this defendant, and by it delivered to Jacob, in St. Louis; that all of its acts were done in good faith, and in accordance with its custom, and the custom and duty of common carriers; that it exercised no act of ownership over said hops, and did not in any manner convert the hops to its own use or the use of any one; that no demand had ever been made upon it by plaintiffs for the hops, or the value thereof; denied the assignment to plaintiff, and alleged the sale of the hops to Jacob, as set forth in the answer of Jacob.

The plaintiffs dismissed their cause of action as to the Wabash, St. Louis, and Pacific Railway Company.

The facts in this case are briefly as follows: On the twenty-fourth day of November, 1879, said S. and F. Uhlmann, assignors of plaintiffs, dealers in hops in New York City, consigned to Robert Jacob of St. Louis a lot of hops, part of which are involved in this controversy. The hops were shipped by the Red Line Transit Company, of which the Wabash, St. Louis, and Pacific Railroad Company was the terminal carrier at St. Louis and East St. Louis, and a bill of lading given therefor, by which it appeared that the hops were consigned to the order of S. and F. Uhlmann. A draft was drawn for the amount of the invoice of the hops, attached to this bill of lading, and sent to the Bank of Commerce of St. Louis, with instructions to surrender the bill of lading to Jacob on payment of the draft; on each bale of hops there was a tag bearing the number and address, R. Jacob & Co. The hops reached East St. Louis over the Red Line Transit Company, and were stored at the depot of the Wabash railroad company. After remaining there a day or so, the Wabash railroad company, the terminal carrier at St. Louis and East St. Louis of the line bringing the hops, addressed to R. Jacob & Co. a notice, stating that the hops consigned to them had been received at the depot in East St. Louis, stating the amount of charges on the same, and that if the goods were

not taken away, and charges paid in twenty-four hours, the hops would be stored at their risk and expense. The notice also stated that the goods would not be delivered without a written order from the consignee (Jacob); and at the bottom of this notice was a blank order to be filled out by Jacob, directing the Wabash railroad company to deliver the hops to the person therein named. Jacob received this notice, carried the same to Fitzgibbon, the agent of defendant, the St. Louis Transfer Company, handed him a check for the amount of the railroad charges, and filled out the blank order at the bottom of the notice, directing the railroad company to deliver the hops to defendant.

The defendant presented Jacob's check for the charges, and his order to the Wabash railroad company, and received from it the hops, which defendant then delivered according to Jacob's direction. This all occurred about the 16th of December, 1879, and in the mean time the bill of lading had been received by the Bank of Commerce attached to the draft, and the draft was unpaid, and the bill of lading was still in the possession of the bank when Jacob received the hops. About two weeks after receiving the hops, Jacob made an assignment for the benefit of his creditors to Hugo Muench, and on the 15th of January, 1880, A. and F. Uhlmann, the original owners of the hops, executed and delivered to plaintiffs an instrument in writing, purporting to assign for value to plaintiffs all their right and interest in and to the hops, and also any claim or dividend they might have by reason of the conversion of the hops against any person. The plaintiffs proved up a claim against the assigned estate of Jacob before Muench, Jacob's assignee, on account of these hops, but whether for conversion or as for a sale, there was some dispute, the assignee stating that he refused to allow the claim as for conversion, and so stated to plaintiffs' attorney when the claim was first presented; but the official record of the assignee shows positively that he allowed the claim as on account, and that plaintiffs' attorney, when finally presenting the claim for allowance, and having it allowed, knew that the assignee had stated, at the time of his first presentation to him, that he could not allow the claim on the basis of a conversion, yet was silent as to this point, though the assignee had given no hint of any change of opinion on that question. Subsequently, several payments were made by the assignee to appellants on account of the allowance, and when this case was tried, and

verdict found, the assigned estate of Jacob was not yet settled, and it was still undetermined what additional payments would be made on account of the allowance. At the trial, the defendant transfer company attempted to show by one of the plaintiffs that they were not the real parties in interest, but the court excluded the testimony, holding that the paper purporting to assign the interest of the Uhlmanns to plaintiffs was conclusive. Defendant transfer company offered to show, as fully appears in the record, that at the time of receiving the goods from the Wabash railway company it had no knowledge of the fact that a bill of lading had been issued to the order of the Uhlmanns, or any one else; that it received the goods from the railroad company without any knowledge of the fact that Jacob was not the consignee, in the regular course of its business as a common carrier; but all this was excluded by the court as immaterial, and to the ruling of the court said defendant duly excepted.

1. The demurrer to the evidence of the plaintiffs should have prevailed. A mere bailee, whether common carrier or otherwise, is guilty of no conversion, though he receive property from one not rightfully entitled to possession, and, acting as a mere conduit, deliver it in pursuance of the bailment, if this is done before notice of the rights of the real owner. On the other hand, if he has such notice, his *status* is altogether altered, and he acts at his peril: Cooley on Torts, 456. This distinction between acting with or without notice, in such circumstances, is fully and pointedly recognized in *Dusky* v. *Rudder*, 80 Mo. 400. Common carriers, by reason of the nature of their business, which imperatively requires them to receive and forward goods when tendered in the usual course of their business, have long formed an exception to the stringency of general rules in respect to what constitutes, in similar cases, a conversion. The authorities on this point are abundant: *Greenway* v. *Fisher*, 1 Car. & P. 190; *Ross* v. *Johnson*, 5 Burr. 2825; *Fowler* v. *Hollins*, 7 L. R. Q. B. 616; *Hiort* v. *Bott*, L. R. 9 Ex. 86; *Burditt* v. *Hunt*, 25 Me. 419; 43 Am. Dec. 289; *Smith* v. *Colby*, 67 Me. 169; *Strickland* v. *Barrett*, 20 Pick. 415; *Loring* v. *Mulcahy*, 3 Allen, 575; *Fouldes* v. *Willoughby*, 8 Mees. & W. 540; *Waring* v. *Railroad Co.*, 76 Pa. St. 491. When goods come into the possession of a person by delivery or by finding, he is not liable in trover for them without proof of a tortious act: *Wilbraham* v. *Snow*, 2 Saund. 47; *Mulgrave* v. *Ogden*, 1 Cro. Eliz. 219. And where a person receives goods by de-

livery from one whom he is entitled to regard as the owner, and having so received them, conveys them to another, to whom they are sent, he does no tortious act: *Parker* v. *Godine*, 2 Strange, 813.

"A conversion may be proved in three ways: 1. By a tortious taking; 2. By any use or appropriation to the use of the person in possession, indicating a claim of right in opposition to the rights of the owner; 3. By a refusal to give up possession to the owner on demand": 3 Rob. Pr. 462, and cases cited. "The idea of property is of the essence of a conversion": 3 Rob. Pr. 459. This case presents none of the elements of a conversion on the part of the transfer company. It was engaged in its ordinary duty of a common carrier. It received the goods from the Wabash railway company, then in the lawful possession of the goods, and without notice of the rights of the real owner delivered those goods in pursuance of the bailment, thus bringing this case fully within the rule laid down by Cooley and other authorities cited. Here no demand or refusal was proved, so as to terminate the lawful holding and transform it into a wrongful one.

2. But it is urged that in this case no demand was necessary, according to the terms of the statute and the rulings made thereon. The statute on the subject is as follows: "It shall not hereafter be available to a party, as an objection, that no demand for the subject-matter of a suit was made prior to its institution, unless it is expressly set up by way of defense in the answer or replication, and is also accompanied with a tender of the amount that is due; in which case, if the plaintiff will further prosecute his suit, and shall not recover a greater sum than is tendered, he shall pay all costs. This provision shall be applicable as well to actions for property as for money; when property is tendered, the damages for its detention, if any, shall also be tendered": R. S. 1879, sec. 1018. This section is found under the appropriate title of "Costs in Civil Cases."

The rulings on that statute are as follows: In *Westcott* v. *De Montreville*, 30 Mo. 252, the action was one for a sum of money, an ordinary action of debt. The same may be said of the case of *Lee* v. *Casey*, 39 Id. 383, where the suit was for the sum of $250. In delivering the opinion, however, it was said that the action was not one of trover, and if it were, etc., citing the statute. The utterance in that case was therefore wholly *obiter*. *Reid* v. *Mullins*, 43 Id. 306, was an ordinary

action for a sum of money, and the statute and the case of *Westcott* v. *De Montreville, supra,* were cited.

Raithel v. *Dezetter*, 43 Mo. 145, is the first case in our reports where the conversion of personal property was the *gravamen* of the action where the statute referred to was invoked. Bliss, J., in delivering the opinion of the court evidently felt the force of the absurdity of treating an innocent act as a wrongful one; for he says: "The removal of the property by the defendant from the smoke-house for storage elsewhere, when he had equal rights with the plaintiff to the use of the smoke-house, could not have been in itself tortious, especially when we consider that the proper use of the smoke-house was for curing meat,—not for storage. Having removed it, as hypothetically stated in these instructions, his possession can only become wrongful by exercising acts of ownership over it or by holding it against the will of the owner. How can he know the will of the owner without some manifestation of that will,—without a demand or something equivalent to it? Moreover, the law requires a demand, when the original possession was innocent, as evidence of conversion. But, by the statute, the want of a demand 'shall not be available to a party' unless it is set up and tender made. The defendant, then, is deprived of the evidence of his innocent holding. He is prohibited, under the pleadings, from showing that such holding was never terminated,—that it never became wrongful by demand and refusal. . . . . The removal of the property, as there supposed, is not a conversion. But what benefit would this statement to the jury have been to the defendant, when the evidence of his innocent holding is unavailable to him? He took it from the plaintiff's possession under circumstances that did not amount to a conversion."

Fisher v. *City of St. Louis*, 44 Mo. 482, was an ordinary action for recovery of the contract price for work done. *Battel* v. *Crawford*, 59 Id. 215, was an action for the conversion of a sum of money. In that case, conversion was in terms alleged, so that no necessity existed for alluding to the statute, and therefore that case cannot be regarded as authority *pro* or *con* for the proper construction of the statute, so that there is but one case in our reports, and that one delivered with much hesitation, which supports the contention of the plaintiffs. I have never thought that the statute applied to an action of trover and conversion. I have never thought that

the legislature intended it to be thus applied. I have understood from an old and able lawyer, now deceased, who was thoroughly conversant with the history of legislation in this state, that the statute in question was passed with reference to what were known as property notes. And the statute might perhaps apply also to the case of a maker or acceptor of a note or bill where no presentment or demand is made at the specified place, and where such an omission or neglect is a matter of defense on the part of the acceptor or maker either to escape altogether, or at least to the extent of damages and costs: 2 Greenl. Ev., 14th ed., sec. 180.

But I do not believe that the legislature ever intended, even conceding the power on its part, to convert an innocent and lawful act into a tortious one. I do not believe that it lies within the compass and bounds of legitimate legislation, by an act retroactive in its nature, to make that which was originally innocent and lawful assume the hue and complexion of one originally wrongful. In a word, the legislature did not design by that statute to create a constructive conversion. Although our civil code has made many sweeping changes in the forms of actions, yet it has not, nor can it, change the substantial elements which go to make up the basis or cause of an action. Again, the action of trover and conversion is one sounding in tort; the damages are unliquidated. The language of the statute is "a tender of the amount that is due," thus plainly indicating indebtedness either in money or property. Besides, tender is not pleadable to a claim for unliquidated damages: 2 Chitty's Pleading, 16th Am. ed., 470; *Dearle* v. *Barrett*, 2 Ad. & E. 82. For these reasons, I am of opinion that the cases of *Raithel* v. *Dezetter*, and *Battel* v. *Crawford*, *supra*, should no longer be followed.

3. And I do not believe that, in any event, the statute in question was intended to apply to common carriers. The section under discussion contemplates an unconditional tender of money or property. Without a demand having been made upon him, a carrier is sued; he is without any means of information whether plaintiff is the owner not. He comes into court, and if he would protect himself against the payment of costs, he must make tender of the money or property. This tender admits the plaintiff's ownership. If it should afterwards turn out that another party is the real owner of the money, etc., the judgment in the first action is no protection to the carrier in the second, he having surrendered

the property without a struggle, purely in order to save costs. The carrier having acquired possession in the course of his public duty and in a lawful manner is not in default, while pursuing the terms of the bailment, until application is made to him by the owner or consignee of the goods. If this be true, then no action lies against him for a conversion until he is placed in default by failure to deliver upon proper demand. And this demand, in such circumstances made and proved, is a condition precedent to the plaintiff's recovery. Views similar to these were recently expressed in the case of *Cole* v. *Railroad Co.*, 21 Mo. App. 443.

4. There was error committed in regard to the allowance of the claim presented to the assignee of Jacob in regard to the force and effect of said allowance. That allowance was, to all intents and purposes, a judgment, appealable from as such, and conclusive as such: *Eppright* v. *Kauffman*, 90 Mo. 25. The official record of the assignee shows positively that he refused to allow the claim on the basis of a conversion, but allowed it as on account. The record of the assignee also shows that Jacob was adjudged, by the assignee, entitled to a reduction of two and a half per cent commission on the hops, and the claim was then allowed, i. e., with such a deduction. And it was admitted on the trial that plaintiffs had received several thousand dollars on the allowed claim, and at that time the assigned estate of Jacob was still unsettled; and it did not appear what additional payment would be made on account of allowance. In such circumstances as the foregoing, the conversion, if any had occurred, must be deemed as waived. Clearly the plaintiffs could not have two strings to their bow; could not ratify the act of Jacob, on the one hand, by having their claim allowed in the ordinary way, with a deduction of commissions, and then, on the other hand, proceed as for a conversion. The two proceedings were utterly incompatible. The plaintiffs were put upon their election to choose which remedy they would pursue, and having elected to go before the assignee, as aforesaid, were necessarily precluded from any other or further remedy.

Any other theory announces this remarkable result: that Jacob is allowed a commission of two and a half per cent on the value of hops he is alleged to have converted tortiously. In *Brewer* v. *Sparrow*, 7 Barn. & C. 310, the assignees of a bankrupt received of a party who had taken possession of the stock of the bankrupt, after a commission in bankruptcy

had received part of the money the trespasser had received for the sale, and sued him in trover for the balance. Bayley, J., said: "I am of the opinion that the plaintiffs . . . . have affirmed the acts done by the defendant with reference to the disposition of the goods of the bankrupt, for they have accepted from him the balance of the account." Holyrod, J., said: "By doing so [receiving part of the proceeds] they [plaintiffs] at all events either recognized him as their agent in the sale of the bankrupt's goods, or they must have received the amount of the balance as a satisfaction for the wrongful act done by the defendant. If they have treated him as their agent, they cannot afterwards treat him as a wrong-doer, and maintain trover. If, on the other hand, they accepted the balance of the account as a satisfaction of the wrongful act, the acceptance of that sum is an answer to the action."

The case of *Lythgoe* v. *Vernon*, 5 Hurl. & N. 179, was also an action for the conversion, by defendant, of some hops. Defendants paid plaintiffs part of the proceeds, which plaintiffs accepted, and then sued the defendants for the entire value of the hops. It was held that if the owner of goods, after a tortious sale of them, waives the conversion, and claims the proceeds of the sale, part of which are paid to him, he cannot afterwards treat the seller as a wrong-doer, and maintain trover against him.

"Where a vendor who has been defrauded in the sale of his goods proceeds to judgment against a vendee upon the contract of sale, after being fully apprised of the fraud, his election is determined, and he cannot afterwards follow the goods, or the proceeds thereof, into the hands of third persons, on the ground of fraud": *Bank of Beloit* v. *Beale*, 34 N. Y. 473. In this case, and in *Kennedy* v. *Thorp*, 51 Id. 176, and *Rodermund* v. *Clark*, 46 Id. 354, it is declared: "Where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts." In *Fields* v. *Bland*, 81 Id. 239, it is held that "where, after goods had gone into possession of defendant, plaintiff accepted confession of judgment for the value thereof, and he collected part thereof, he is held to have elected to treat the goods as the property of defendant, and he cannot afterwards change his grounds to that of wrongful taking and conversion." In an analogous case in this court, where the service on a defendant was by order of publication, a personal judgment rendered, and his land sold, it was ruled that he, knowing all the facts,

could not accept the surplus of the proceeds of the sheriff's sale without affirming the sale, and thus placing himself in a place where he could not question its validity: *Austin* v. *Loring*, 63 Mo. 19. For the most obvious reasons, then, the plaintiffs could not with one hand gather in the proceeds of the hops in the assignee's court, and with the other hand take the hops or their proceeds in the circuit court.

5. Something has been said about the defendant transfer company being a connecting carrier. I find no proof of this assertion in the record. The destination of the goods had been reached in East St. Louis, and the Wabash railway had notified Jacob that they were ready for delivery upon payment of freight and charges, insisting on the immediate delivery of the goods, accompanied by a threat of increased charges for delay. In such circumstances, the transfer company was no more of a connecting carrier than would a drayman have been who was employed to cart the goods away, and upon the foregoing facts it may be fairly presumed that the Wabash railway company was the terminal line.

6. Our statute is express that "every action shall be prosecuted in the name of the real party in interest," etc.: R. S. 1879, sec. 3462. The answer of the transfer company denied the assignment of the cause of action to plaintiffs, and that they were the real parties in interest, all of which were issuable allegations, and error was committed in excluding evidence offered in their support. Other errors are assigned, but it is unnecessary to notice them.

Judgment of the St. Louis court of appeals reversing that of the circuit court is hereby affirmed.

BLACK and BRACE, JJ., concurred on all points, except that they do not regard the allowance by the assignee as a judgment.

WHEN ELECTION TO PROSECUTE ONE REMEDY BARS RESORT TO ANOTHER: See *Thomas* v. *Joslin*, 1 Am. St. Rep. 624, note 626, where this subject is discussed at length.

CONVERSION BY COMMON CARRIER: See *Maguin* v. *Dinsmore*, 26 Am. Rep. 608; *Rankin* v. *Memphis & C. P. Co.*, 24 Id. 339; *Adams* v. *Clark*, 57 Am. Dec. 41, note 43, where other cases in that series are collected.

REAGAN *v.* ST. LOUIS, KEOKUK, AND NORTHWESTERN RAILWAY COMPANY.

[93 MISSOURI, 348.]

MASTER WHO EMPLOYS SERVANT IN COMPLEX AND DANGEROUS BUSINESS OUGHT TO PRESCRIBE RULES sufficient for its orderly and safe management, and his failure to do so is a personal negligence, for the consequence of which he is liable to his servant.

RAILROAD COMPANY IS LIABLE TO ITS SERVANTS FOR INJURIES RECEIVED IN CONSEQUENCE OF WANT OF REGULATIONS for their guidance in making flying switches, and in the shunting and kicking of its cars.

WHETHER THE DEFENDANT WAS IN THIS CASE GUILTY OF NEGLIGENCE in failing to prescribe suitable rules was held to be a question for the jury.

ACTION to recover for personal injuries. The opinion states the case.

R. M. Lakenan, for the plaintiff in error.

Anderson and Foreman, and P. Trimble, for the defendant in error.

By Court, BLACK, J. There was a judgment for the defendant in this case on a demurrer to the petition. To review that ruling, the plaintiff sued out this writ of error. The petition is lengthy, and we extract from it the following facts: —

The plaintiff, a boy seventeen years old, was in the employ of the defendant. It was his duty to carry water for a gang of men engaged in repairing the roadbed, and to take charge of the tools used by them. They were all under the direction of a foreman. The foreman, laborers, and plaintiff traveled in a caboose-car attached to a freight train, composed of four or five cars. When the train stopped at a point near West Quincy, the engineer, fireman, and a brakeman, who were not under the control of the plaintiff's foreman, detached the engine, leaving the train standing on the main track, and went north, with a view of taking some freight-cars from a switch, and placing them in the train. In the mean time, plaintiff and his foreman examined the track south of the train, the caboose being at that end of the train. The foreman directed the plaintiff to go back and notify the laborers to get out with their tools, and remove snow from the track. The boy obeyed the instructions, and assisted in getting the tools out of the car. After the men and tools were out, and just as he was getting off the rear platform, the engineer and brakeman shoved some cars down the main track, and against the standing train, knocking the plaintiff off the platform, and

the caboose ran over him. The cars were shoved down the main track by the maneuver known as "kicking." Plaintiff's leg and arm were broken. The petition then, among other things, contains the following allegations: "Plaintiff says that until felled by said cars, as described, he was not aware of their approach, and had no reason to be aware of their approach. Plaintiff says that he was in no wise guilty of any negligence in the premises. Plaintiff says that his said injuries were directly caused by and through the negligence of said defendant, directly resulting in said injuries to plaintiff, and as and for said negligence the plaintiff specifies the following particulars: 1. The plaintiff says that the defendant negligently failed and omitted to provide any rules or signals or system to be observed by said engineer in operating said locomotive and detached cars, so as to give to said occupants of said caboose-car, or to plaintiff thereon, some alarm, warning, or notice of the approach and impact of said detached cars, and thereby negligently caused plaintiff to be taken unawares and injured as described."

The ground of the demurrer is, that the petition does not state facts sufficient to constitute a cause of action. The charge of negligence above set out does not count on any negligent act of the engineer, fireman, or brakeman. It is not alleged or claimed that they, or either of them, were guilty of negligence. So far as this demurrer is concerned, no question arises as to an injury to one servant by the negligence of a fellow-servant. Whether the engineer and brakeman were or were not fellow-servants with the plaintiff is, at this time, wholly immaterial, and not the question to be determined. The charge is, that the defendant negligently failed and omitted to provide any rules or signals or system to be observed in cases like that described; so that it is not the act of the servant which is complained of, but the omission of duty on the part of the defendant itself. The duty of the master is stated in Shearman and Redfield on Negligence, section 93, as follows: "It is also the duty of the master, so far as he can, by the use of ordinary care, to avoid exposing his servants to extraordinary risks, which they could not reasonably anticipate, though he is not bound to guarantee them against risks. One who employs servants in complex and dangerous business ought to prescribe rules sufficient for its orderly and safe management. His failure to do so is a personal negligence, for the consequences of which he is liable to his servants.

Thus a railroad company is bound to regulate the time and manner of running its trains, so as to avoid collisions, and to enable all its servants to know when a train may be expected, and thus to avoid danger."

The defendant in error contends that the joining of the cars, for the purposes and in the manner described in the petition, is so common, necessary, and frequent, especially in the case of freight trains, that it cannot be said to involve any extraordinary risk. We do not agree to the proposition. It is certainly a complex business, requiring care, and must be dangerous if not done under proper regulations, at least so far as other servants are concerned, whose business requires them to be in and out of the cars liable to be jolted. In these cases of making a flying switch, and of shunting or kicking of cars, it is feasible and perfectly proper to have some rules and regulations to warn persons liable to be injured; and cases are not wanting where railroad companies have been held liable to servants for injuries received in consequence of a want of such regulations for the guidance of the servants in performing these maneuvers: *Vose* v. *Railroad*, 2 Hurl. & N. 728, and *Chicago etc. R. R. Co.* v. *Taylor*, 69 Ill. 461. The petition states a cause of action. Whether the defendant was, in this case, guilty of negligence in failing to prescribe suitable rules, is a question for the jury.

The judgment is reversed, and the cause remanded for further proceedings.

DUTY OF MASTER TO PROVIDE FOR SAFETY OF HIS SERVANTS: See *Wormell* v. *Maine Central R. R. Co.*, 1 Am. St. Rep. 321, note 330, where other cases in these series are collected; *Lewis* v. *Seifert*, 2 Id. 631, note 638.

NOE *v.* KERN.

[93 MISSOURI, 367.]

WORDS OF RECOMMENDATION, REQUEST, ENTREATY, WISH, OR EXPECTATION ADDRESSED TO LEGATEE or devisee will make him a trustee for the person or persons in whose favor such expressions are used, provided the testator has pointed out with sufficient clearness and certainty both the subject-matter and the objects of the intended trust. No particular form of expression is required to create a valid and binding trust.

PRECATORY TRUST MAY BE ATTACHED TO PROPERTY DEVISED TO ANOTHER ABSOLUTELY, provided the intention to so charge it appears from the will.

IN CONSTRUING WILL, INTENTION OF TESTATOR IS TO BE ASCERTAINED, if possible, and in looking for the intention, the surrounding circumstances may be taken into consideration.

PROCEEDING in equity. The opinion states the case.

Martin, Laughlin, and Kern, and Given Campbell, for the appellant.

Collins and Jamison, and John Wickham, for the respondents.

By Court, NORTON, C. J. This is a proceeding in equity which calls for the construction of the will of Virginia C. Ferguson, wife of William F. Ferguson. She died on the 6th of September, 1883, leaving the following will:—

"In the name of God, amen. I, Virginia C. Ferguson, wife of William Ferguson, of St. Louis, Missouri, make and declare this to be my last will and testament, and hereby revoke all other wills by me heretofore made. 1. I give, devise, and bequeath unto my husband, William Ferguson, all of my real and personal estate absolutely, the real estate being mostly situate in the city of Norfolk, county of Norfolk, state of Virginia. I make this bequest in the full faith that my husband will properly provide for the two children of my deceased brother, Simeon, whom we have undertaken to raise and educate. I appoint my said husband, William Ferguson, the executor of this my last will and testament."

Two days after the death of Mrs. Ferguson, her husband died, leaving a will theretofore made, devising all his property to his wife, the said Virginia, without making any provision for the two children of said Virginia's brother, Simeon, whom they had undertaken to raise and educate, and who are the plaintiffs in this suit; and they claim that, from the precatory words used in her will, a trust was created in their favor. During the two days that said William lived after his wife's death the evidence showed that he was under the influence of morphine, and not capable of transacting business. The said Virginia, at the time of her death, owned, in St. Louis, personal property worth about ten thousand dollars, and also owned considerable real estate in Virginia. Some time before the death of Mrs. Ferguson, she and her husband, who were childless, took into their family Paul and Sadie Noe (the plaintiffs in this suit), two children of Simeon Noe, the deceased brother of Mrs. Ferguson, who lived with them as their adopted children, and were supported and maintained by them as such until the death of said Virginia and Wil-

liam Ferguson. No debts were proved up against the estate of said Virginia.

The circuit court held that by the will of Mrs. Ferguson her estate passed to her husband charged with a trust in favor of said Paul and Sadie Noe, and that the sum of nine thousand dollars was a reasonable amount for the purpose Mrs. Ferguson had in view, which was adjudged to be paid over to the curator of the plaintiffs, both of whom were minors. The defendant has appealed from this judgment, and insists that the will of Mrs. Ferguson does not admit of the construction thus put upon it, and that if it does, the judgment of the court is for too large an amount. In support of the first ground relied upon, it is insisted that the tendency of recent decisions is to restrict rather than enlarge the doctrine applicable to precatory trusts, and we have been cited to a number of authorities stating that proposition generally. While this may be so, it may nevertheless be safely affirmed that they do not overthrow the rule, prevailing both in England and in this country, "that words of recommendation, request, entreaty, wish, or expectation addressed to a legatee or devisee will make him a trustee for the person or persons in whose favor such expressions are used; provided, the testator has pointed out, with sufficient clearness and certainty, both the subject-matter and the objects of the intended trust": 1 Jarman on Wills, Randolph and Talcott's Notes, 680.

The rule upon this subject is stated, in the case of *Schmucker's Estate* v. *Reel*, 61 Mo. 596, to be as follows: "Courts of equity have frequently discussed the question as to the force of words or expressions of recommendation in wills in regard to the use to which testators might desire persons to whom they had given legacies to put the same. The prevailing doctrine is, that no particular form of expression is requisite in order to create a valid and binding trust; and that words of recommendation, request, entreaty, wish, or expectation will impose a binding duty upon the devisee by way of trust, provided the testator has pointed out with sufficient clearness and certainty both the subject-matter and object of the trust."

In this class of cases, the difficulty is not as to what the rule is, but as to its application, and as is said in 1 Perry on Trusts, third edition, section 114: "Every case must depend upon the construction of the particular will under consideration. The point really to be determined in all these cases is, whether,

looking at the whole context of the will, the testator intended to impose an obligation on his legatee to carry his wishes into effect, or whether, having expressed his wishes, he intended to leave it to the legatee to act on them or not, at his discretion." I do not understand the fact to be disputed that two of the conditions presented by the above rule as being necessary to the creation of a trust, viz., the subject-matter of the trust and the objects of the trust, are set forth in the will with sufficient clearness and certainty; but it is claimed that the precatory words used are not sufficient to raise a trust, and that the devise of the property to the husband absolutely is inconsistent with the notion or contention that, by the second clause of the will, it was intended to charge the property thus devised with a trust.

That a trust may be attached to property devised to another absolutely, provided the intention of the testator to so charge it appears in the will, we think is settled by the following cases: In *Knight* v. *Knight*, 3 Beav. 172, it is laid down as a general rule that "when property is given absolutely to any person, and the same person is, by the giver, who has power to command, recommended, or entreated, or wished to dispose of that property in favor of another, the recommendation, entreaty, or wish shall be held to create a trust: 1. If the words are so used that, upon the whole, they ought to be construed as imperative; 2. If the subject of the recommendation or wish be certain; and 3. If the objects or persons to have the benefit of the recommendation or wish be also certain": *Bohon* v. *Barrett*, 79 Ky. 378; Hill on Trustees, 71.

It is shown by the evidence in this case that Mr. and Mrs. Ferguson had no children; that the two infant plaintiffs were the children of Mrs. Ferguson's deceased brother; that both of them were frail, in bad health, without any means of support; that one of them was so affected that, in all probability, she would never be able to contribute to her own support, on account of her mental and physical deformities; that these children were taken into their family and treated as their children, though they were never legally adopted; that they were the objects of great solicitude, both on the part of Mrs. Ferguson and her husband, from 1872 till the time of her death; that her husband died in three days after she did, having been, during that time, in a state of stupor and unable to transact business. Was it the intention of Mrs. Ferguson that these children should be provided for by her husband out

of the property devised by her to him, and is that intention sufficiently shown by the use of the words, "I make this bequest in the full faith that my husband will properly provide for the two children of my deceased brother, Simeon, whom we have undertaken to raise"?

It is well settled that, in construing a will, the intention of the testator is to be ascertained, if possible, and that, in looking for the intention, the surrounding circumstances may be taken into consideration: *Hall* v. *Stephens*, 65 Mo. 677; 27 Am. Rep. 302; Wigram on Wills, 112. In view of the circumstances surrounding Mrs. Ferguson, and the language of the will, we think it cannot be doubted that she intended that her husband should provide for the children out of the property devised to him.

In the case of *Warner* v. *Bates*, 98 Mass. 274, the wife made a will devising to the husband for his life the use and income of her estate, "in the full confidence that, upon my decease, he will, as he has heretofore done, continue to give and afford my children such protection, comfort, and support as they or either of them stand in need of." It was held, Bigelow, C. J., rendering the opinion, that the words employed subjected the use and income to a trust which a court of equity would enforce, and in speaking of the rule that the intent of the testator must govern in such cases, observed: "It may be sometimes difficult to gather that intent, and there is always a tendency to construe words as obligatory in furtherance of a result which accords with a plain moral duty on the part of a devisee or legatee, and with what it may be supposed the testator would do if he could control his action." In the case of *Knox* v. *Knox*, 59 Wis. 172, 48 Am. Rep. 487, the language of the will was: "Having full confidence in my said wife, and request at her death she will divide equally," etc., and it was held to be sufficient to create a trust: *Erickson* v. *Willard*, 1 N. H. 217; 1 Jarman on Wills, 680.

Considering the frail and helpless condition of these children, the manner in which they had been raised, the circle in society in which they moved, we are unwilling to say that the sum decreed to be paid to their curator was more than it ought to be.

Judgment affirmed.

PRECATORY TRUST, WHAT WORDS RAISE: See *Knox* v. *Knox*, 48 Am. Rep. 487, note 494, where this subject is discussed; *Foose* v. *Whitmore*, 37 Id. 572; *Williams* v. *Worthington*, 33 Id. 286; *Anderson* v. *Hammond*, 31 Id. 612;

Pennock's Estate, 59 Am. Dec. 718, note 727, where other cases in that series are collected.

IN CONSTRUING WILL, TESTATOR'S INTENT GOVERNS: See *Phelps* v. *Bates*, 1 Am. St. Rep. 92, note 96, where other cases in that series are collected.

SIDEKUM *v.* WABASH, ST. LOUIS, AND PACIFIC RAILWAY COMPANY.

[98 MISSOURI, 400.]

DEFENDANT HAS NO ABSOLUTE RIGHT TO HAVE PERSONAL PHYSICAL EXAMINATION OF PLAINTIFF MADE, in an action for personal injuries. The granting or refusing of an order for such an examination rests in the discretion of the trial court, which discretion will not be interfered with unless manifestly abused.

WHERE COURT MERELY DENIES MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF for the time being, at the same time remarking that if, during the progress of the trial, it appeared necessary to ascertain the plaintiff's real condition, and the nature and extent of her injuries, he would then direct such an examination, and the defendant does not at any subsequent stage of the proceeding renew the application for such order, the court may well assume that the defendant abandoned his application for the order.

EVIDENCE OF CONDITION OF RAILROAD TRACK SHOULD BE CONFINED TO PLACE OF ACCIDENT, or to the immediate vicinity thereof, in an action against the company for injuries sustained on its road; and testimony as to the condition of the track a mile and a half from the place of the accident is incompetent and inadmissible. The reception of such improper evidence will not, however, be ground for reversal, where it was withdrawn, and excluded from the jury, by the subsequent instruction of the court, the competent and admissible evidence in the record being amply sufficient to authorize the verdict, independent of that erroneously received.

DISCRETION OF TRIAL COURT IN REGULATING CONDUCT OF COUNSEL IN ARGUMENT will not ordinarily, in civil cases, be interfered with by the appellate court, unless counsel is permitted, against objections, to make or persevere in improper remarks. In the absence of timely objection and exception to such remarks, they will be deemed to have been waived.

ACTION for personal injuries. The opinion states the case.

H. S. Priest, for the appellant.

Green and Burnes, for the respondents.

By Court, RAY, J. Plaintiffs, who are husband and wife, brought this action in the circuit court of Buchanan County, Missouri, to recover damages for personal injuries to the wife while traveling as a passenger on a freight train of defendant, between the stations of Lathrop or Converse and Lawson, on the twenty-fourth day of July, 1883. Upon a trial of the

cause, plaintiffs obtained a verdict and judgment in the sum of six thousand dollars, from which defendant has prosecuted this appeal to this court.

The grounds relied on for a reversal of the said judgment, as stated by counsel for defendant, are: 1. That the court erred in overruling its application for a personal physical examination of the wife, the real plaintiff; 2. That the court erred in admitting testimony concerning the bad condition of appellant's track at other places than that where the accident occurred; 3. In giving instruction No. 3, at plaintiffs' request; and 4. In permitting plaintiffs' attorney, in his closing address, to remark upon things outside of the record calculated to excite the prejudices of the jurors, and to deceive and mislead them as to the law concerning the measure of recovery.

In a case involving a similar application to the one mentioned in said first exception, this court expressed the opinion, modifying a previous ruling had in *Loyd* v. *Railroad Co.*, 53 Mo. 515, that, whilst the party had no absolute right to such personal examination, and the court could not compel the party to submit thereto, the court may properly, in the exercise of its discretion, order such an examination to be made in a proper case, and enforce its order in the several ways there specified; and that the exercise of its discretion in that behalf would not be interfered with by this court, unless manifestly abused: *Shepard* v. *Railroad Co.*, 85 Mo. 634. In that case, the court say: "The order asked by defendant was unreasonable, in that it asked that this lady should submit to a personal examination, not by one skilled surgeon, but by at least three." This and other observations and rulings in said case would seem to control the application in this case, which was "for an order that said female plaintiff submit her person to an examination of physicians, to be named by defendant, not exceeding four in number." It further appears, in this case, that said motion, having been filed on the day before the trial, was taken up and heard by the court when the cause was called for trial on the next day, and that the court denied the motion at the time, remarking that if, during the progress of the trial, it appeared necessary to ascertain the real condition of plaintiff, and the nature and extent of her injuries, he would then direct an examination by physicians.

The witnesses testifying for plaintiff upon the subject of her health and condition, both before and after the injury on the railroad, were the female plaintiff, Hannah Sidekum, in her

own behalf, her stepmother, Mrs. Harrison, and the family physician, Dr. Bane. Omitting consideration of the testimony of the other witnesses, that of Dr. Bane delivered before the trial judge, who was, we may assume, personally acquainted with him, and knew his reputation as a physician, was, in general and substance, that he had practiced in the family of Mrs. Sidekum for twelve years; that he was called to see her immediately upon her arrival in St. Joseph, and found her suffering great pain from introversion or dislocation of the womb, the womb pressing on the bladder, surrounding parts inflamed, and some external bruises, the more serious ones being located on the abdomen and back part of the body; that he attended at her house over two months, seeing her nearly every day; that an abscess formed in two or three weeks after the injury, with a discharge through the soft parts, which had not healed when he last saw her, some three or four weeks previous to time of giving his testimony; that her condition was much improved; that he did not regard her condition incurable, as it is curable in some cases, but that the probability was that the injury would be permanent; that she was still under treatment, although he was not visiting her at the time of the trial. He also testified that, prior to the accident, she had been sound and healthy; that, in the course of his twelve years' attendance as her physician, he had made, prior to the accident, several examinations of the womb, which examinations were occasioned by some symptoms of which she complained, and which he thought made such examinations necessary, but that, upon personal examination, he had found those organs healthy and strong. The action of the trial court upon said motion, as we have seen, was merely a refusal to grant the same for the time being, and as defendant did not again renew its application for such order at any other stage of the proceeding, the court may have well concluded that, after hearing the said evidence in the cause introduced by plaintiff, including that of Dr. Bane, which we have given in substance, defendant did not deem it necessary to renew its motion, or to insist thereon, but had abandoned the same.

We will now proceed to the second of said exceptions, as to the admission of evidence in plaintiffs' behalf, as to the condition of the railroad at places other than that of the accident. In the recent case of *Stoher* v. *Railroad Co.*, 91 Mo. 509, a somewhat analogous question was involved. This court there an-

nounced its disinclination to adhere to the rule in all its strictness, which is held in numerous cases, and which limits the party to the precise time or the exact place of the occurrence. The condition of the roadbed at the place or in the immediate vicinity of the accident may, we think, be shown. This is also declared, in effect, in the case of *Hipsley* v. *Railroad Co.*, 88 Mo. 348, where Chief Justice Norton, speaking for the court, further observes that "the fact that the road in other places may not have been in good condition had no tendency to prove it was in a bad condition at the place where the accident in question happened." Tested by these decisions, the testimony of the witness Crowley as to the condition of the track a mile and a half from the place of the accident, and the testimony of other witnesses of like import, must, we think, be held incompetent and inadmissible.

But in view of the instructions given in the cause, this evidence must, we think, be held to have been withdrawn and excluded from the jury. The following, given by the court of its own motion, we think, accomplishes that purpose: —

"9. In this case, defendant is only liable for injuries suffered by its passengers on its trains, if such injuries were caused by its negligence in some one, or all of *the particulars charged specifically in the petition, and these particulars are alleged to be at the place of the accident, when the train arrived there:* 1. Defective rails; 2. Imperfect fastenings thereof; 3. Decayed and imperfect ties upon which said rails rested; 4. Sunken condition of the ties and rails; and 5. That the ends of the rails in said track did not meet at the joints properly. *No other item or conjecture of negligence can be considered by the jury in this case;* and unless the jury find, from the evidence, that the injury occurred in consequence of defects in some one or all of these respects, the jury must find for the defendant."

The evidence in the record, which was competent and admissible, was amply sufficient to authorize the finding independent of that erroneously received, and the above instruction was, we think, such as should be held to cure and make harmless the error committed in the admission of the evidence referred to.

The third exception taken to the instruction, given upon the measure of damages, and which is as follows, is, we think, also untenable: —

"The court instructs the jury that if they find for the plaintiffs in estimating the amount of damges, it is their duty to

consider the physical condition of Hannah Sidekum before and since receiving the injuries sued for, and the physical pain and mental anguish suffered by her at the time of and since said accident, on account of said injuries, and the amount of pain she will likely suffer in the future on account of said injuries, *together with all other circumstances shown in evidence;* and *considering all the circumstances aforesaid,* they will find a verdict for such sum as in their judgment will compensate for said injuries, not exceeding ten thousand dollars."

The objection is not to any of the items or elements of damages specified in the instruction, which are conceded to be correct, but that the language which is put in italics authorized the jury, not only to consider the enumerated grounds of compensation, but other matters in addition, such, for example, as the bad condition of the railroad at other places than that of the accident; but, fairly considered, the instruction is not, we think, vulnerable to this or other similar criticism, and the exception taken to said instruction must be overruled.

The fourth and remaining exception will now be noticed briefly. This, as already appears, pertains to the closing argument made in behalf of plaintiff. The cases to which we have been referred all recognize the difficulty and delicacy involved in any attempt to confine counsel to a strictly legitimate course of argument, and the restrictions and limitations which may be fairly imposed are, we think, necessarily somewhat indefinable: *Loyd* v. *Railroad*, 53 Mo. 514. As was said in that case, "it is, no doubt, the duty of the judge who presides at the trial to prevent such departures from the proper and legitimate sphere of counsel"; and in criminal cases, some of which have been cited, this court has condemned in strong terms departures from the proper practices and usages in this behalf. In civil cases, ordinarily, this court cannot interfere with the discretion of trial courts, unless counsel is permitted, against objections, to make or persevere in such arguments; but where such objection is made, and the exception to such a course in argument is duly taken, the same may be good ground for new trial or for reversal. We do not understand the case of *Brown* v. *Swineford*, 44 Wis. 282, to which we were referred, and in which Justice Ryan considers this question, to go to any greater length. We must necessarily defer, to a large extent, in any case, and especially in civil cases, to the action of the trial courts upon questions of

this sort. In the present case, there was no objection made or exception saved to the said closing argument of plaintiffs' senior counsel, at the time or during its delivery, and no ruling of the trial court then asked in that behalf. In the absence of such timely objection and exception, we must, under our practice, deem the same waived, at least in a civil case, and where the damages awarded by the verdict do not appear to be excessive, we cannot reverse the judgment upon this ground.

This leads to an affirmance of the judgment, and it is accordingly so ordered.

COMPELLING PARTY TO SUIT TO SUBMIT TO PERSONAL PHYSICAL EXAMINATION.—It seems to be determined by the greater number of decisions in this country that, in an action to recover damages for personal injuries, the court has power to compel the plaintiff to submit to a physical examination by competent experts, for the purpose of ascertaining, when necessary, the nature and extent of the injuries that he claims to have sustained: *Schroeder* v. *Chicago etc. R'y Co.*, 47 Iowa, 375; *Atchison etc. R. R. Co.* v. *Thul*, 29 Kan. 466; 44 Am. Rep. 659; *Walsh* v. *Sayre*, 52 How. Pr. 334; *Turnpike Co.* v. *Baily*, 37 Ohio St. 104; *White* v. *Milwaukee City R'y Co.*, 61 Wis. 536; 50 Am. Rep. 154; Patterson on Railway Accident Law, 424. In delivering the opinion of the court in *Schroeder* v. *Chicago etc. R'y Co.*, 47 Iowa, 375, Beck, J., said: "To our minds, the proposition is plain that a proper examination by learned and skillful physicians and surgeons would have opened a road by which the cause could have been conducted nearer to exact justice than in any other way. The plaintiff, as it were, had under his own control testimony which would have revealed the truth more clearly than any other that could have been introduced. The cause of truth, the right administration of the law, demand that he should have produced it. . . . . It is said that the examination would have subjected him to danger of his life, pain of body, and indignity to his person. The reply to this is, that it should not, and the court should have been careful to so order and direct. Under the explicit directions of the court, the physicians should have been restrained from imperiling in any degree the life or health of the plaintiff. The use of anæsthetics, opiates, or drugs of any kind should have been forbidden, if, indeed, it had been proposed, and it should have prescribed that he should be subjected to no tests painful in their character. As to indignity to which an examination would have subjected him, as urged by counsel, it is probably more imaginary than real. An examination of the person is not so regarded when made for the purpose of administering remedies. Those who effect insurance upon their lives, pensioners for disability incurred in the military service of the country, soldiers and sailors enlisting in the army and navy, all are subjected to rigid examinations of their bodies, and it is never esteemed a dishonor or indignity. The standing and character of the physicians who should have been appointed to make the examination would not only have secured plaintiff from insult and indignity, but would have been a guarantee that nothing would have been attempted which would have endangered his life or health. We have been able to find no case in which the question before us has been considered, and we have been referred to no

authority by counsel that seems to have much application thereto. The courts have held in divorce cases, when the impotency of a party is in question, an examination may be ordered of the person alleged to be impotent: See 2 Bishop on Marriage and Divorce, secs. 590 et seq., and notes. The foundation of this rule is the difficulty of reaching the truth in any other way than by an examination of the person. The authorities referred to may be regarded as giving some support to our conclusion. It is the practice of the courts of this state, sanctioned by more than one decision of this court, to permit plaintiffs who sue for personal injuries to exhibit to the jury their wounds or injured limbs in order to show the extent of their disability or suffering. If for this purpose the plaintiff may exhibit his injuries, we see no reason why he may not, in a proper case, and under proper circumstances, be required to do the same thing for a like purpose, upon the request of the other party. If he may be required to exhibit his body to the jury, he ought to be required to submit it to examination of competent professional men."

The right of the defendant to have the plaintiff personally examined by medical witnesses, with the view to ascertain the character and extent of his injuries, is not, however, an absolute right. The granting or refusing of an order for such an examination rests in the discretion of the court, and its discretion will not be interfered with unless it has been manifestly abused: *Shepard* v. *Missouri Pacific R'y Co.*, 85 Mo. 629. In the case of *Sioux City etc. R. R. Co.* v. *Finlayson*, 16 Neb. 578, 49 Am. Rep. 724, it was decided not to be error for the court to refuse to order the plaintiff, in an action for personal injuries, to submit to an examination of his person by physicians who are witnesses for the defendant, in the absence of any showing whatever that justice would be promoted thereby, especially when the plaintiff submits to an examination by such witnesses in the presence of the jury. And in *Hatfield* v. *St. Paul etc. R. R. Co.*, 33 Minn. 130, 53 Am. Rep. 14, it was held that, while the court has the power, in a proper case, and under proper circumstances, to require the plaintiff, in an action for personal injuries, to perform a physical act in the presence of the jury that will show the nature and extent of his injuries, the propriety of doing so in a given case rests largely in the discretion of the court; and when the uncontradicted testimony of a number of witnesses showed, in that case, that the plaintiff limped when she walked, it was not error for the court to refuse to require her to walk across the court-room in the presence of the jury. Mitchell, J., who delivered the opinion of the court in that case, said: "We conclude that a court has the power, in a proper case, and under proper circumstances, to direct the plaintiff to do a physical act in the presence of the jury that will illustrate or show the character of his injuries. And we are by no means prepared to say that there may not be circumstances where the defendant would have a right to such an order. But it is evident from the very nature of things that the propriety of such an order must usually rest largely in the discretion of the trial court; and it would only be in case of a plain abuse of such discretion that we would interfere. In the present case, we think the court very properly refused to direct the plaintiff to exhibit herself to the jury and bystanders by walking across the room. Such an act would have furnished the jury little or no aid in determining the extent or character of her injuries. The only fact it could by any possibility have determined was whether or not she was lame or 'limped,' as she testified, in walking. But there was already ample and uncontradicted evidence of this fact. Her own evidence was fully corroborated by that of three or four witnesses — her neighbors or members of her own family — who had seen her almost daily since the accident."

POWER OF COURT TO ORDER PHYSICAL EXAMINATION OF PARTY DENIED. — But while the greater number of authorities hold that the court has power, in proper cases and under proper circumstances, to compel a plaintiff in an action for personal injuries to submit to an examination of his person, for the purpose of ascertaining the nature and extent of his alleged injuries, there are several cases in which such a power has been strenuously denied: *Roberts* v. *Ogdensburgh etc. R. R. Co.*, 29 Hun, 154; *Newman* v. *Third Avenue R. R. Co.*, 50 N. Y. Super. Ct. 412; *Parker* v. *Enslow*, 102 Ill. 272; *Loyd* v. *Hannibal etc. R. R. Co.*, 53 Mo. 509. Learned, P. J., in delivering the opinion of the court in *Roberts* v. *Ogdensburgh etc. R. R. Co.*, 29 Hun, 157, said: "We know of no right which this court has to compel a party to submit to any bodily examination. . . . . If a party is entitled to the compulsory exhibition of the body of his opponent, it would seem to follow that he might have such exhibition made before the jury. And the court might require the plaintiff, on the trial, and before the jury, to submit to the same examination as is required by this order. It is undoubtedly true that not infrequently plaintiffs suing for bodily injuries do exhibit in court the injured part. Nor do we know of any reason why they should not do this, notwithstanding the exhibition may excite sympathy. And, on the other hand, all unreasonable concealment of an injured part (not justified by any dictate of modesty or otherwise) may excite a doubt in the minds of the jury as to the genuineness or extent of the alleged injury. But we cannot admit the principle that, either in the presence of the jury, or in the presence of a referee, a party can compel his opponent to exhibit his body, in order to enable physicians to examine and question, and testify." And Napton, J., delivering the opinion of the court in *Loyd* v. *Hannibal etc. R. R. Co.*, 53 Mo. 515, said: "The proposal to the court to call in two surgeons, and have the plaintiff examined during the progress of the trial as to the extent of her injuries, is unknown to our practice and to the law. There was abundant evidence on this subject on both sides; any opinion of physicians or surgeons at that time would have only been cumulative evidence, at least, and the court had no power to enforce such an order."

PHYSICAL EXAMINATION IN SUITS FOR DIVORCE OR ANNULMENT OF MARRIAGE. — In suits for divorce or for annulment of marriage on the ground of impotence, it is well settled in England, and generally in this country also, that the court may direct and compel a proper medical and surgical examination of the persons of the parties whenever it is necessary: 2 Bishop on Marriage and Divorce, secs. 590, 591; *Pollard* v. *Wybourn*, 1 Hagg. Ecc. 725; *H.* v. *P.*, L. R. 3 Pro. & D. 126; *Devanbagh* v. *Devanbagh*, 5 Paige, 509; 28 Am. Dec. 442, note 450; *Newell* v. *Newell*, 9 Paige, 25; *Shafto* v. *Shafto*, 28 N. J. Eq. 34; *Le Barron* v. *Le Barron*, 35 Vt. 365. But in *Anonymous*, 35 Ala. 226, it was held to be in the discretion of the court to grant or refuse an order for such examination. And in *Page* v. *Page*, 51 Mich. 88, it was held that physicians cannot testify in a divorce suit to what they have found out by a compulsory examination of the persons of the parties; that such examinations are illegal and improper, and that a party should refuse to submit to them. Cooley, J., who delivered the opinion in that case, said: "There was also a most extrordinary compulsory examination of the defendant by physicians, who stripped him, and subjected him to oral inquisition, to compel him to give evidence which they could repeat before the commissioner for use against him. What means they could be supposed to have for compelling him to answer their questions in case he declined, as he ought to have done, we do not know; but we are certain they could not be means known to the law. We

strike from the record all the evidence obtained by this inquisition also. It should be understood that there are some rights which belong to man, as man, and to woman, as woman, which in civilized communities they can never forfeit by becoming parties to divorce or any other suits, and there are limits to the indignities to which parties to legal proceedings may be lawfully subjected."

PLAINTIFF IN ACTION FOR PERSONAL INJURIES MAY EXHIBIT HIS INJURIES to the jury. And there is no valid objection to his exhibiting his injuries to the examination of the surgeon who is called to describe the injury before the jury: Patterson on Railway Accident Law, 424; *Mulhado* v. *Brooklyn City R. R. Co.*, 30 N. Y. 370.

APPLICATION FOR ORDER FOR PHYSICAL EXAMINATION should not be so made as to delay the trial, or to prejudice the plaintiff in proving his case. And if it is not made until the plaintiff's case is closed, and no reason is shown for the delay, the application may be denied on that ground: *Turnpike Co.* v. *Baily*, 37 Ohio St. 104.

IMPROPER CONDUCT OF COUNSEL AT TRIAL, EFFECT OF: See *Baltimore & O. R. R. Co.* v. *Boyd*, 1 Am. St. Rep. 362, note 368, where other cases in these series are collected.

OVERHOLT *v.* VIETHS.

[93 MISSOURI, 422.]

RULING OF TRIAL COURT REJECTING EVIDENCE WILL BE PRESUMED PROPER where nothing is preserved in the record to show the contrary.

IT IS NOT ERROR TO EXCLUDE EVIDENCE OF FINANCIAL CONDITION OF MOTHER in an action brought by her to recover damages for the drowning of her son, when she had already testified as to her circumstances and surroundings at the time the accident happened.

EVIDENCE OF IMPRACTICABILITY OF MAKING FENCE IS ADMISSIBLE as bearing upon the question of negligence, in an action for damages for the death of plaintiff's son, based upon the alleged negligence of the defendant in not fencing on a line of his lot which did not abut upon a street or highway, but on the private property of another, especially where it was shown that the defendant had owned the lot but a short length of time.

OWNER OF LAND IS NOT UNDER OBLIGATION TO STRANGERS TO PUT GUARDS AROUND EXCAVATIONS made by him, unless such excavations are so near a public highway as to be dangerous, under ordinary circumstances, to persons passing upon the way, and using ordinary care to keep upon the proper path; in which case he must take reasonable precautions to prevent injuries happening therefrom to such persons.

ACTION to recover damages for the death of plaintiff's child. The opinion states the case.

James P. Dawson and G. M. Stewart, for the appellants.

Hitchcock, Madill, and Finkelnburg, and David Goldsmith, for the respondent.

By Court, NORTON, C. J. This suit is to recover damages for the death of plaintiff's eight-year-old son, who was

drowned, as alleged, in a pond of water which had been formed in consequence of rock having been quarried on a lot in the city of St. Louis, owned by the defendant. The jury returned a verdict for plaintiffs, and assessed the damages at ten dollars, and from the judgment rendered thereon they have appealed; and among other errors assigned is the action of the court in refusing to admit in evidence the following section of an ordinance of the city of St. Louis:—

"SEC. 15. All holes, depressions, excavations, or other dangerous places within the city of St. Louis that are below the natural or artificial grades of the surrounding or adjacent streets shall be properly inclosed with fences or walls, or be filled up, so as to prevent persons and animals from falling into them."

This ordinance was objected to on the ground that it had not been pleaded, and on the further ground that the other sections of the ordinance showed that said section related to highways. Inasmuch as one of the grounds of objection is based upon the fact that other sections of the ordinance showed that the section in question related to public highways, and inasmuch as those other sections are not preserved in the record, we must indulge in the presumption that the ruling of the court was proper: *Kansas City* v. *Clark*, 68 Mo. 588.

During the examination of Mrs. Overholt,—and after she had stated that she was the mother of the child, and a widow at the time of the accident; that she had one other child, a daughter, about fifteen years old; that she and her daughter did the housework; that she had no servant, and at the time of the accident, she was engaged in housework,—she was asked what her financial condition was; and this being objected to by defendant as being immaterial, the objection was sustained, and plaintiffs excepted. In view of what she had been allowed to state as to her condition in life, we are of the opinion that the objection was properly sustained. The court, in receiving her statements as to her circumstances and surroundings at the time the child was drowned, went as far as this court has gone in the case of *Winters* v. *Railroad Co.*, 39 Mo. 468–475, and others to which we have been cited.

The court allowed a witness to state, over the objection of plaintiffs, that along the eastern line of defendant's lot a fence could not be built without drilling post-holes in the rock. It appears from the evidence that the excavation in the lot had been made by quarrying twelve or fifteen years before the ac-

cident; that defendant had acquired the lot about four months only before it occurred; that the said excavation extended up to and across the eastern line between defendant's lot and a lot owned by one Hardy; that the eastern bank of the pond, which was precipitous and steep,—in some places fifteen or twenty feet high above the water,—was wholly upon the lot of said Hardy, excepting the projection of an occasional rock, extending over the eastern line of defendant's lot. It also appears that the son of plaintiff approached and fell into the pond from the east side, and that he could not approach it from that side without passing over Hardy's lot.

It is clear from the petition that this is not an action to recover damages occasioned by the negligence of defendant in failing to fence his lot along a street or highway to guard against accidents to travelers thereon, but it is based on the alleged negligence of defendant in not fencing on a line of his lot which did not abut on a street or highway, but on the private property of another; and the statement of the witness as to the impracticability of making such fence (if any obligation whatever rested upon him to build a fence there) certainly had a bearing on the question of negligence, especially so in view of the short length of time he had owned the property.

It is next insisted that the amount of damages awarded by the jury is grossly inadequate, and that the trial court erred in not granting a new trial for that reason. The question of difficulty in this case is, whether the plaintiffs had, under the undisputed facts, any cause of action against defendant. It is neither claimed in the petition, nor is it shown by the evidence, that the son of plaintiff fell into this pond while passing along or over a street or highway, by reason of the failure of the defendant to put a fence along such street to guard against such accident; but the petition avers that plaintiff's son fell into this pond on the east side thereof, and the evidence shows that the east bank of the pond was wholly on the lot of one Hardy, with the exception of an occasional rock jutting from said bank, one of which extended about eighteen inches over the line onto defendant's lot, and that plaintiff's approach to the pond was on Hardy's lot. Whether he fell from the bank or jutting rock does not satisfactorily appear.

The rule of liability of an owner of property, under such circumstances, is stated in Shearman and Redfield on Negligence, page 598, section 505: "The occupant of land is under

no obligations to strangers to place guards around excavations made by him, unless such excavations are so near a public way as to be dangerous, under ordinary circumstances, to persons passing upon the way, and using ordinary care to keep upon the proper path; in which case he must take reasonable precautions to prevent injuries happening therefrom to such persons." The same rule is announced in 1 Thompson on Negligence, page 303, section 3; *Klix* v. *Nieman*, 68 Wis. 271; 60 Am. Rep. 854; *Gillespie* v. *McGowan*, 100 Pa. St. 144; *Galligan* v. *Manufacturing Co.*, 143 Mass. 527; *Straub* v. *Soderer*, 53 Mo. 38.

While the authorities above cited recognize the liability of the owner if a child is injured by dangerous machinery so situated and exposed that it will naturally attract children, who cannot be expected to comprehend the danger of its use, and takes no precaution to prevent access to it, and thereby impliedly invites children to it, they distinctly deny the liability of a lot-owner under the facts disclosed in this case.

The case of *Klix* v. *Nieman*, 68 Wis. 271, 60 Am. Rep. 854, decided by the supreme court of Wisconsin in March, 1887, is analogous in its facts to the case before us. In that case, the complainant alleged that defendant was the owner of a lot in the city of Milwaukee, situated on the northeast corner of two streets. The lot was in a thickly settled and populous part of the city, and was not fenced, but was vacant, so that the public had free and unobstructed access thereto from both streets; that a long time prior to the accident, there had been a deep and dangerous hole or excavation partially filled with water, making a pond covering about the entire surface; that the water of the pond was soily, so that its depth could not be ascertained except by measurement, but that in places it was of the depth of nine feet, so that the pond was dangerous to the lives of children, who might be attracted thereto for amusement or otherwise; that defendant, well knowing that the said pond was dangerous to the lives of children residing in the vicinity of the same, wrongfully, negligently, and carelessly permitted it to remain unguarded by fence or barricade; and that plaintiff's son, a lad about nine years old, while playing around said pond of water, being induced thereto by reason of the unguarded and unprotected condition of said hole, as aforesaid, fell and was precipitated into the same, and was drowned.

In disposing of the question as to whether these facts, which were admitted by demurrer, authorized a recovery, it is said:

"It will be observed that it is not alleged that the pond was so near the highway as to make it unsafe for passengers going along the street or sidewalk, and no averment that the boy, when he fell into the pond, was passing along the street or sidewalk. On the contrary, it is stated that the boy was playing upon and around the pond when he was precipitated into the water and drowned. So the single question presented is, Was it the duty of the defendant to fence or guard this hole or excavation on his lot (which it does not appear he made, or caused to be made) when surface water collected, in order to secure the safety of strangers, young or old, who might go upon or about the pond for play or curiosity? If the defendant was bound to so fence or guard the pond, upon what principle or ground does this obligation rest? There can be no liability unless it was his duty to fence the pond. It surely is not the duty of an owner to guard or fence every dangerous hole or pond or stream of water on his premises for the protection of persons going upon his land who had no right to go there. No such rule of law is laid down in the books, and it would be most unreasonble to so hold." The judgment of the circuit court sustaining the demurrer was affirmed.

So in the case of *Gillespie* v. *McGowan*, 100 Pa. St. 144, defendants were the owners of a lot in the suburbs of Philadelphia, upon which there was and had been for some time a deep well, which was uncovered and open to view. Neither the well, nor the lot on which it was situated, was fenced around. The lot was a common place of resort for children and adults. A boy a little less than eight years of age was found drowned in the well, his hat being found on the side, together with a few small fishes. In a suit by the father, it was held that the boy was a trespasser, and that defendants had not been guilty of any such negligence as would render them liable, it being observed—after criticising and in part overruling the case of *Hydraulic Works Co.* v. *Orr*, 83 Pa. St. 332—that "there are streams and pools of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property either to inclose it or fill up their ponds and level the surface, so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amuse-

ments are attended with danger, and accidents frequently occur. It is part of a boy's nature to trespass, especially where there is tempting fruit, yet we have never heard that it was the duty of the owner of a fruit-tree to cut it down because a boy trespasser may possibly fall from its branches. Yet the principle contended for by the plaintiff would bring us to this absurdity, if carried to its logical conclusion. Moreover, it would charge the duty of the protection of children upon every member of the community, except their parents."

Under this view of the case, plaintiffs cannot be heard to complain that they only obtained a verdict for ten dollars damages, inasmuch as the facts in evidence would have justified the court in directing a verdict for the defendant. But as defendant has not appealed, the judgment will be affirmed, with the concurrence of the other judges.

EVIDENCE EXCLUDED IS PRESUMED TO HAVE BEEN CORRECTLY EXCLUDED UNLESS THE RECORD SHOWS THE CONTRARY: See *Whittier* v. *Collins*, 2 Am. St. Rep. 879.

LIABILITY OF OWNER OF LANDS FOR INJURIES TO PERSONS COMING THEREON: See *Donaldson* v. *Wilson*, 1 Am. St. Rep. 487, note 489, where other cases in these series are collected.

PECUNIARY CIRCUMSTANCES OF PLAINTIFF, WHEN ADMISSIBLE IN EVIDENCE: See note to *Rowe* v. *Moses*, 67 Am. Dec. 566, where this subject is discussed at length; *Chicago* v. *Powers*, 89 Id. 418; *Pennsylvania R. R Co.* v. *Books*, 98 Id. 229; *Little Rock etc. R'y Co.* v. *Leverett*, *ante*, p. 230.

CASES

IN THE

SUPREME COURT

OF

COLORADO.

YENTZER *v.* THAYER.

[10 COLORADO, 63.]

ENTRY OF DEFAULT AND JUDGMENT before the time specified in the summons for its return, and in the absence of defendant and his counsel, is beyond the jurisdiction of the court, and void. In such case, the cause remains for trial as though there was no pretended default or trial or judgment.

WHERE JUSTICE'S TRANSCRIPT OF EVIDENCE fails to show that either plaintiff or defendant appeared at the time specified for the return of the summons, or any reason for their absence, or that the case was continued, it will be presumed that the parties did not appear, and that the cause was totally continued.

ACTION OF account before a justice. The summons was duly issued, but before the time specified for the return thereof default and judgment was entered against defendant. On the next day a new summons was issued, defendant sued, and process served for the same debt. On the return day of the last summons, defendant appeared, the cause was tried, and judgment entered against her. She appealed from this judgment to the county court, where it was affirmed, hence this appeal. Plaintiffs attempted to take an appeal to the county court on the first judgment after the second one was rendered, and caused an order to be entered dismissing the first suit without prejudice. When this order was entered, the second suit was pending in the county court.

A. D. Bullis, for the appellant.

J. M. Breeze, L. L. Breeze, and T. C. Earley, for the appellees.

By Court, HELM, J. The evidence before us fully warranted the finding and judgment of the court below.

The remaining objection here urged by counsel rests upon the refusal of the county court to abate the action on the ground of a former suit pending. Defendant was entitled to be heard at the time specified in the first summons issued; and entering default and judgment against her before that time, in the absence of herself and counsel, was a proceeding as completely beyond the jurisdiction of the justice as though the process had never been served. The denial to her, in this way, of her right to appear, was, "in legal effect, the recall of the citation" served upon her. The acts mentioned were wholly without warrant or authority, and the judgment of the justice, thus rendered, was void. "A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal": *Windsor* v. *McVeigh*, 93 U. S. 274; *Howard* v. *Clark*, 43 Mo. 344. This legal proposition was practically recognized by the justice himself when he made the following docket entry on the subject: "This judgment was rendered by mistake, and without legal notice, and hence is dismissed and set aside."

The cause remained for trial as though there had been no pretended default or trial or judgment. But as to what was done when 3 o'clock P. M., the hour named in the summons, arrived, we are not informed. The justice's transcript in evidence is silent on the subject. It shows no appearance by either plaintiff or defendant, or any reason for their absence; neither does it indicate that the cause was continued. We must therefore assume that the parties did not appear, and that nothing was done. The correctness of this assumption is demonstrated by subsequent proceedings. But when plaintiffs failed to appear at the time fixed in the summons, or to give sufficient reason for their non-appearance, it was the duty of the justice to dismiss the cause: Gen. Stats., sec. 1941. And under the circumstances above narrated, although the justice failed to obey this statute, a total discontinuance of the cause took place: Moore's Justice, secs. 492, 493, and cases cited. Therefore, when plaintiffs, on the succeeding day, brought the present action upon the same account, the first suit was not pending. There was no ground for plea in abate-

ment, and had one been properly presented, it must have been overruled.

The subsequent attempted appeal by plaintiffs themselves from a judgment that was void, and in a cause that was out of court, amounted to nothing. It could in no way affect the foregoing conclusion.

The judgment of the county court is affirmed.

JUDGMENT PREMATURELY ENTERED, as where summons has been served, but the time allowed by law to plead has not expired, is irregular merely, and not void: *Mitchell* v. *Aten*, 1 Am. St. Rep. 231.

HOOPES *v.* COLLINGWOOD.

[10 COLORADO, 107.]

WHERE THE INDORSEE OF A NOTE fills the blanks contained therein so as to change the rate of interest from the legal rate to an excessive rate, without the knowledge or consent of the maker, the note is vitiated and becomes void.

Bereman and Jones, for the appellant.

Bullick and Dickson, for the appellees.

STALLCUP, C. This is an action upon a promissory note by the plaintiff (appellant) against the defendants (appellees). The complaint states that plaintiff was assignee of the insolvent corporation, the Bank of Breckenridge, to pay its debts with its property; that defendants, upon the seventeenth day of February, 1881, made and delivered for value to one W. W. Goodrich their promissory note at eleven days for $744.12; that Goodrich, for value, before maturity, sold and transferred this note to the Bank of Breckenridge, which bank afterwards transferred and assigned to plaintiff for purpose aforesaid; that the note is due and unpaid; prays judgment for the amount and costs. The answer, all the defendants answering jointly, states that they made to Goodrich their certain promissory note bearing date of February 17, 1881, whereby they promised to pay him eleven days thereafter said sum of $744.12, but deny it was for value, and allege it was for accommodation, and deny receipt of any consideration; and further say they made the note in writing in these words and figures: —

"744.12. BRECKENRIDGE, COL., February 17, 1881.

"Eleven days after date, we promise to pay to the order of W. W. Goodrich seven hundred and forty-four and 12-100 dollars, with interest at —— per cent per —— from —— until paid.

"E. J. COLLINGWOOD.
"GEO. H. BRESSLER.
"R. B. STAPP.
"W. J. SWIFT."

That this note was delivered to said Goodrich in those words and figures; that said Goodrich indorsed said note over to the bank, but they have no knowledge, etc., as to whether or not the bank purchased said note or paid value; that, at the date of this transaction, one Allen was a director, stockholder, and the cashier of said bank, and then and there materially altered said note, and changed defendants' liability, by inserting the word "two" between the words "at" and "per cent," the word "month" between the words "per" and "from," and the word "date" between the words "from" and "until," thereby making the note read, "with interest at two per cent per month from date until paid"; that such alteration was without the knowledge or consent of defendants, and was a forgery and fraud upon the defendants, and the note was thus rendered null and void; that they repudiated this alteration, and refused to pay as soon as they learned that it was altered. Plaintiff demurred for that the facts pleaded in the answer were not sufficient to constitute a defense. This demurrer was argued, and the court overruled the same, and the plaintiff standing upon and abiding by his demurrer, judgment was rendered for defendants and against the plaintiff, to which plaintiff excepted. The plaintiff then appealed to this court.

The demurrer admitted all the facts well pleaded in the answer. So we have the case. The note was made and delivered to payee, as shown above, before maturity. It was indorsed by the payee to the bank, and was then and there filled up by the bank without the knowledge or consent of the makers, so that it reads, "with interest at two per cent per month from date until paid." The questions presented by the assignment of errors and the argument of counsel here are: —

1. Does such a note, with such blanks, thereby carry authority to the purchaser thereof to fill the blanks in the manner here shown, whereby the rate of interest is changed from the legal rate, viz., ten per cent per annum, to twenty-four per cent per annum? We answer, not: *Rainbolt* v. *Eddy*, 34 Iowa,

440; 11 Am. Rep. 152; *Bank* v. *Stowell*, 123 Mass. 196; *Holmes* v. *Trumper*, 22 Mich. 427; 7 Am. Rep. 661.

2. Is the note vitiated and avoided by such change in its terms by the purchaser, without the knowledge or consent of the makers? We answer that it is, for thereby it ceases to be the promise they made, and the effect is the extinguishment of the promise: 1 Greenl. Ev., sec. 565; *McGrath* v. *Clark*, 56 N. Y. 35; *Inglish* v. *Breneman*, 5 Ark. 377; *Coburn* v. *Webb*, 56 Ind. 96.

The judgment in the case ought to be affirmed.

RISING, C., and MACON, C., concurred.

By COURT. For the reasons assigned in the foregoing opinion, the judgment is affirmed.

FILLING BLANK FOR RATE OF INTEREST in note by the holder, — whether constitutes alteration avoiding the note: *Fisher* v. *Dennis*, 65 Am. Dec. 534, and note; *Rainbolt* v. *Eddy*, 11 Am. Rep. 152, and note; *Holmes* v. *Trumper*, 7 Id. 661, note 669.

FILLMORE *v.* WELLS.

[10 COLORADO, 228.]

ATTORNEY'S LIEN IS NOT LIMITED TO COSTS or to taxable fees, in Colorado, but it reaches all fees due for services rendered, whether the amount has been agreed upon or is to be settled in suit as upon a *quantum meruit*.

ATTORNEY'S LIEN, IN COLORADO, IS NOT LIMITED TO COMPENSATION for services rendered by the attorney in procuring the judgment upon which he relies.

ATTORNEY'S LIEN, IN COLORADO, ATTACHES as well to judgments involving an interest in real property as to mere money judgments.

WHERE ATTORNEY NEGLECTS TO PROCEED TO ENFORCE HIS LIEN for compensation under a judgment involving an interest in land until the judgment debtor has discharged his liability, or an innocent third party has, in good faith and for valuable consideration, purchased the land, the attorney will be held to have waived and lost his right to look to the debtor on one hand and the land on the other for his compensation.

ATTORNEY'S LIEN FOR COMPENSATION will support a suit in equity, where the employment is questioned and the amount unliquidated, and having assumed jurisdiction to enforce the lien, equity will retain it for all purposes, determining the incidental though material legal questions involved.

ATTORNEY'S LIEN IS EQUITABLE RIGHT or privilege. It is not property in the thing which gives right of action at law, but a charge upon the thing which is protected in equity, though law courts may recognize it when the *res* is in possession of the leinor and the owner is seeking to deprive him of it.

WHERE ATTORNEY'S LIEN ATTACHES UNDER JUDGMENT involving an interest in land, and the latter afterwards becomes a trust estate for several wards, an equitable action will lie to directly enforce the lien against and upon a specific part of the ward's estate, without first obtaining judgment against the several guardians.

IN EQUITABLE ACTION TO ENFORCE ATTORNEY'S LIEN under a judgment concerning an interest in land which afterwards becomes a trust estate belonging to wards, testimony as to facts which occurred subsequent to the ancestor's decease is admissible.

EQUITY EXERCISES SOUND DISCRETION, without adhering to any inflexible rule, in determining whether there has been a misjoinder of parties.

WHERE ALLEGED MISJOINDER OF PARTIES appears on the face of the complaint, and is demurred to and overruled but an answer is filed and the trial proceeded with, the defendant waives his right to insist on the alleged error in the appellate court.

FINDING OF REFEREE AND COURT, as to what would be reasonable compensation for services rendered as attorney, will not be disturbed when founded on the decided weight of expert testimony.

WELLS AND SMITH, attorneys, commenced suit in equity on behalf of J. Norman and J. S. Fillmore, minor heirs of J. S. Fillmore, deceased, and against J. J. Reithman, to recover certain real property, together with the rents and profits thereof. They were so employed by the guardian of such heirs, and prosecuted the suit to a successful termination, both in the lower court and on appeal. Pending the proceedings, one Macon became a member of the firm,—Wells, Smith, and Macon, attorneys,—and participated in prosecuting the suit. When suit was instituted, one Kershow was guardian for said heirs; such guardian was succeeded by one Irwin, he was succeeded by one Charles, and he in turn by one Patterson, one of the present defendants. The employment of said attorneys is duly proved and recognized. Wells, Smith, and Macon bring the present suit in equity, seeking to have the amount of their fees determined and adjudged a lien upon the Reithman decree, and the land recovered thereunder. They obtained a decree for six thousand dollars, to be paid into court by Reithman, or upon his default it was decreed that execution should issue, and if said amount could not be collected out of his estate, then the land recovered under the judgment against him should be sold to pay the amount. From this decree the appeal is taken. The complaint was demurred to on the grounds of misjoinder of parties plaintiff, misjoinder of causes of action, and non-joinder of parties defendant, namely, the three guardians named above who resigned before the institution of the present suit, and prior to the termination of the first suit. The law relating to attorneys' liens is found in

Colorado General Statutes, section 85, as follows: "All attorneys and counselors at law shall have a lien upon any money or property in their hands, or upon any judgment they may have attained [obtained] belonging to any client, for any fee or balance of fees due, or any professional service rendered by them in any court of this state; which said lien may be enforced by the proper civil action."

H. C. Dillon, for the appellants.

Wells, Smith, and Macon, for the appellees.

By Court, HELM, J. The nature and scope of the attorney's lien at common law have been considered in a large number of cases. Upon some of the various questions involved in such consideration, there is no little contrariety of judicial opinion. But this lien in Colorado is regulated by statute; and several of the matters upon which such diversity of opinion exists are thus effectively put at rest.

Our statute recognizes both the general and special branches of the attorney's lien as it was enforced at the common law; but in some important particulars this lien under the statute is much more complete and satisfactory than it is at the common law. The statutory lien is not limited to costs or to taxable fees. It reaches all fees due for services rendered, whether the amount of such fees has been agreed upon or is to be settled in suit as upon a *quantum meruit*. Nor is it limited to compensation for services rendered by the attorney in procuring the judgment upon which he relies. In this respect it is more comprehensive than the mechanic's lien; it covers a balance legally due him for any and all professional services theretofore rendered his client. While the meaning of the statute in these respects is clear, some other matters connected with the principal subject are not left wholly free from doubt. Counsel for appellant have succeeded in presenting several questions that are both interesting and perplexing. These questions will be briefly considered in their appropriate order.

1. Does the lien given by this statute upon judgments include a decree awarding plaintiff an interest in lands, and thus subject the realty recovered to the payment of the attorney's fee?

There are a few decisions which seem to sustain the attorney's right to look, through his lien, to the land for his taxable fees in such cases; but the weight of authority undoubtedly

sanctions the proposition of counsel for appellant that no such privilege is awarded by the common law. Whether the discrimination thus made in favor of money judgments is based upon satisfactory reason or sound principle, we need only consider in so far as it aids us in giving a proper construction of the statute, for we are not now dealing with the common law. This statute recognizes no distinction between judgments for money or personal property and decrees or judgments by which the ownership or possession of land is awarded to plaintiff, or his interest therein is preserved. It gives the attorney a lien upon "any judgment" obtained by him, and belonging to his client. The language used is clear and comprehensive; it seems to cover all kinds of judgments, regardless of the subject-matter to which they relate. We do not feel at liberty to say that it was the legislative intent to exclude from the operation of the statute all judgments or decrees involving the ownership or preservation of land. Had such been the legislative purpose, different language would have been used in framing the section. This view of the provision is not only consistent with established rules of statutory construction, but, in our judgment, it also comports with an equitable administration of justice in the premises.

The custom of advocates to render their services *quiddam honorarium* does not exist in this country. We doubt very much if counsel for appellant, who discourse with such evident admiration upon this practice as it existed centuries ago in Rome, in France, and in England, would be willing to see it established in Colorado. The advocate or counselor who should here to-day imitate Cicero, and give his services gratuitously, relying solely upon the gift which, in the language of Sir John Davy, "guieth honor as well to the taker as the guier," would soon find the wolf at his door, unless, like Cicero, he had other sources of revenue. It may, from counsel's standpoint, be a humiliating fact, but it is a fact, nevertheless, that in this respect the legal profession occupies the *status* with us of other employment followed for a livelihood. The attorney is considered worthy of his hire, and is not in danger of disbarment if he contract in advance for his fees, and collect them by suit, when necessary, after the service is rendered.

The attorney's lien, in so far as it relates to judgments, may be accurately defined as a right conferred by statute, or recognized by the common law, to have his compensation or

costs, or both, directly secured by the fruits of the judgment. To declare him entitled to a lien upon the judgment, without permitting him through such lien to reach and control the subject-matter of the recovery, would be bestowing upon him the shadow and withholding the substance. He would be no better off than are other general creditors of his client. What equitable consideration supports the conclusion that he should be secured in this way by the fruits of a money judgment, and yet as to the fruits of a decree or judgment relating to realty that he should occupy the attitude of a mere general creditor? The fruits of the latter judgment are often far more valuable to his client than are the fruits of the former. Cases involving the title to or the possession of real estate present questions quite as complicated and difficult, and demand of the attorney quite as much learning and labor as do those relating to damages for torts, or for the violation of simple contracts.

The strongest objection stated in the decisions to recognizing the attorney's lien, where fees are not taxable, in this class of cases, is based upon the proposition that the lien is secret. It is asserted that, as a consequence of this secret lien, the judgment debtor, or the innocent purchaser of the land in controversy, may suffer wrong through the assertion of the lien after a *bona fide* settlement of the judgment, on one hand, or purchase of the land, on the other. It is even declared in one case that "every tract of land which had once been a subject of litigation would lose most of its exchangeable value from an apprehension of some latent lien in favor of some attorney": *Humphrey* v. *Browning*, 46 Ill. 476; 95 Am. Dec. 446. If under our statute a consequence so grave as the foregoing could follow the recognition of the lien, and if there were room in the language used for construction, we would hesitate long before applying the law in this and similar cases. But however it may be at common law, in Illinois or other states where this view concerning the secret lien and its effect is adopted, the objection has with us no particular force; because, while our statute gives the lien upon the judgment, and, as between attorney and client, nothing need be done prior to its enforcement as to innocent purchasers of the fruits of the judgment, we hold that it may be otherwise.

In *Smelting Co.* v. *Pless*, 9 Col. 112, we declared that the judgment debtor is entitled to notice of the attorney's intention to enforce his lien, and that if, without such notice, the

debtor make a *bona fide* payment or settlement of the judgment, the attorney cannot look to him. The reasons stated in that opinion with reference to the attitude and liability of the judgment debtor apply with even greater force to an innocent purchaser for value of the land recovered or preserved by a decree or judgment.

We have no statute regulating attorneys' fees, and making them a part of the judgment. With us this is solely a matter of contract between attorney and client. The judgment debtor and the innocent purchaser are total strangers to this contract. If no fees are due the attorney, no lien exists. The debtor or purchaser does not necessarily know that the fees were not fully paid or secured in advance, and that the attorney is in position to invoke the statute. Neither are they aware that he will enforce the lien, if he has the right to do so. There is nothing compulsory in this particular; he may or may not, as he chooses, subject the fruits of the judgment to the payment of his fees. While the lien upon the judgment undoubtedly exists if there is a balance due the attorney for services, yet the right to enforce it against the subject-matter of the recovery may, in our opinion, be waived. It is unfortunate that the statute neither specifies a time for the enforcement of the lien, nor a method of giving notice of the purpose to do so. But it is unquestionably true that the legislature never intended the lien to be a perpetual encumbrance upon the fruits of the judgment, regardless alike of the attorney's laches in asserting his intention and the rights of innocent purchasers for value.

We think that if the attorney neglects to proceed to the enforcement of his lien until the debtor has in good faith discharged his liability under the judgment, or a third person has in good faith, and for valuable consideration, purchased the fruits thereof, he should be held to have waived the right to look to the debtor, on one hand, or to such fruits on the other, for his compensation. That is to say, if, without notice that the attorney intends to enforce his lien, the judgment debtor make a *bona fide* settlement of the judgment, or an innocent third person purchase the property, the statutory right is lost. Of course, any collusive settlement or purchase made for the purpose of depriving the attorney of the benefit of his lien would not be in good faith, and would be of no avail against him.

Again, no objection to recognizing the attorney's lien where

his fees are not taxable, is thus stated in *Forsythe* v. *Beveridge*, 52 Ill. 268, 4 Am. Rep. 612: "There would be cases in which a very unreasonable portion of the fruits would be demanded by the attorney, and collected under the pressure he could bring to bear upon his client." This objection is declared by the learned court to be of "great weight." Its force is in no wise diminished by the fact that a judgment, as in the case at bar, relates to realty, and not to money damages only. Conduct of the kind mentioned would merit and receive the severest judicial censure, and the guilty party would soon find himself in professional disrepute. But it is sufficient for us to say, with reference to this specific objection: 1. That, as already declared, fees to be determined as upon a *quantum meruit* are clearly covered by the statute considered; and 2. That such determination takes place in court under rules of evidence and principles of procedure calculated to insure justice between parties litigant.

2. A second question fairly presented by the record and arguments before us is, Can a suit in equity be maintained by the attorney for the enforcement of his lien, when the employment is questioned, and the amount of his compensation is unliquidated?

Counsel contend that since a court of equity is not the proper forum to entertain inquiries into questions of contract, nor the proper tribunal to hear evidence and determine the reasonable value of services rendered, these matters ought to have been adjudicated in a court of law. They say that plaintiffs should have brought their action in a legal forum, and there had all controversy concerning the contract, as well as the amount of compensation, first determined; and that then they might perhaps have instituted proceedings in equity for the enforcement of their lien, if any lien they had.

The distinction between causes of action at law and in equity doubtless remains. No attempt has been made to abolish it, and any such attempt would be futile. The code merely abolishes forms of action, substituting, for the numerous common-law forms, but one general method of pleading, whether at law or in equity. And unless a court of equity would, before the code, have been properly clothed with jurisdiction over the cause of action stated in the complaint before us, the action cannot be maintained in equity under the code: *Bank* v. *Ford*, 7 Col. 314.

The attorney's lien, whether under the statute or at com-

mon law, is equitable in its nature. Even the decisions in this country, which confine its existence and application to the narrowest limits, always speak of it as an equitable lien, right, or privilege. It is not property in the thing which gives a right of action at law. It is a charge upon the thing which is protected in equity. Courts of law may recognize it when the *res* is in possession of the lienor, and the owner is seeking to deprive him of such possession. But where the thing is not in possession, and some affirmative action is required by the attorney, he, like other lien claimants, must seek relief in equity. In some instances, a formal suit should be instituted; in others, an application to the court rendering the judgment for the proper order would be sufficient.

The main purpose of plaintiffs in this case is to utilize their lien by subjecting, through it, the rents and real estate, if need be, recovered by their exertions, to the payment of their claim for services. Since the employment by the different guardians and the amount of compensation are controverted matters, it becomes incidentally necessary to investigate and determine these questions. If plaintiffs intruded themselves into the cases without employment, and their voluntary services were objected to and repudiated, or if they have been paid all those services are reasonably worth, the statute gives them no lien. But since a court of equity is the only forum that can enforce, by proper decree, the lien rights, we are of opinion that this is one of the cases wherein such court may take and retain jurisdiction for all purposes. Having assumed jurisdiction to enforce the lien, it would be encouraging a multiplicity of suits, and in this, as in other respects, contrary to established procedure in equity, to say that the court of equity shall not determine the incidental though material legal questions involved. Appellants waived the right, if any such right they had, to have a jury summoned to try any of the questions of fact presented, by consenting in open court to the trial by a referee of "all the issues of law and of fact." We do not say that plaintiffs could not have proceeded otherwise; but we are of the opinion that, under the circumstances, the suit is "a proper civil action," within the meaning of the statute.

3. It is asserted that, under the contract of employment, plaintiffs are bound to look to the several guardians alone for their compensation; that while, perhaps, the guardians may secure reimbursement from the ward's estate, yet neither the wards nor their estate can, by plaintiffs, be directly proceeded

against and held liable. It is obvious that this objection, if well taken, is decisive against plaintiffs' right of action in the present suit; for if plaintiffs can neither look to the wards nor their estate for the compensation demanded, of course no lien can be decreed, and this equitable action must fail.

Counsel's proposition is based upon the rule that at common law the guardian can, in general, make no contract binding upon the person or estate of the ward: *Simmons* v. *Almy*, 100 Mass. 239; 1 Parsons on Contracts, 134–136; Schouler on Domestic Relations, 463; *Stevenson* v. *Bruce*, 10 Ind. 397; *Tenney* v. *Evans*, 14 N. H. 343. This rule seems to be sanctioned by a strong preponderance of authority, so far as common-law actions are concerned. In such actions, the guardian's contract and liability, except for necessaries under certain circumstances, are, in general, dealt with by the creditor as purely personal. But this is not an action at law, nor is it against the wards or their estate, generally. It is a suit in equity for the enforcement of a statutory lien upon a specific portion of the ward's property. The land and the rents recovered in the original Reithman suit belong to a trust estate; but, by virtue of the statute, they are nevertheless, it is claimed, encumbered with the attorney's lien.

We have already decided that, in general, the attorney's lien upon a judgment recovered by him, and belonging to his client, reaches the fruits of such judgment, though realty be the subject-matter in controversy. We have also held that this lien may be enforced, by a suit in equity, directly against the property burdened therewith. Are these conclusions regarding the force and effect of the statute erroneous, and is the statute itself inapplicable, where the fruits of the judgment recovered, whether consisting of money or land, become part of a trust estate?

The statutory guardian in Colorado is invested with the general charge and management of the ward's estate, real as well as personal. Such control is, of course, subject to the limitations, express and implied, contained in the statute. The guardian is also authorized to prosecute and defend all cases relating to the ward's estate. It is his duty to recover the ward's real property when wrongfully appropriated or withheld, and to demand, sue for, and receive all moneys belonging to the ward.

It might have been better had Mrs. Kershow first obtained from the probate court an express command or license to in-

stitute and prosecute to judgment the original suit against Reithman; but she and the other guardians would have been derelict in the discharge of their official duty had they failed, either with or without such consent, to proceed as they did. Their power and authority in the premises, however, could not now be successfully questioned, nor is there any attempt to challenge them. That suit was instituted for the benefit of the wards. The relation of attorney and client may have existed between plaintiffs and the guardians, yet the suit was prosecuted in the name of the wards, and they were the real clients as well as the real parties in interest. The services of plaintiffs added greatly to the value of the wards' estate without in the least benefiting the guardians, who neither sought nor derived any personal advantage through the suit. In making and continuing the contract of employment with plaintiffs, the guardians acted solely in their official capacity. There appears to have been no intention, either on the part of plaintiffs to look to the guardians alone for compensation, or on the part of the guardians to incur individual liability in connection therewith. This compensation will ultimately become a charge upon the whole of the estate, should the right to treat it as a direct and superior charge upon a specific part of the estate be denied. Sustaining the lien avoids circuity of proceeding as well as increased expense and annoyance; therefore the true interest of the wards themselves, like that of all other persons concerned, will be best subserved by recognizing the application of the statute.

While the guardian who employs counsel in behalf of the estate is ordinarily regarded as the client, a court of equity, acting under the lien statute, should so far disregard this technical rule as to recognize the clientage of the real party in interest; and after careful deliberation, we have no hesitancy in declaring that such a court, governed by the considerations above mentioned, and others that might have been but are not stated, should enforce the lien in the present as in other cases. It is believed that this is a question of first impression in Colorado; and if the above conclusion can be said to conflict with the position sometimes taken in relation to the attorney's charging lien and trust funds, we feel at liberty to recognize the foregoing modification thereof, sanctioned, as we think, by reason as well as the statute.

4. If the views above stated be correct, it follows that the three guardians preceding Patterson are not necessary parties

defendant to the present proceeding. Their official character wholly terminated prior to the rendering of the decree in the first suit against Reithman; and if they were liable at all, their liability is ignored by plaintiff, so far as this proceeding is concerned.

5. The objection of counsel for appellant to the testimony of plaintiffs themselves must be overruled. If the present suit can be regarded as in any sense within the purview of section 3641, General Statutes, relied on by appellants in support of this objection, the evidence mentioned was nevertheless admissible; for the facts to which plaintiffs testified "occurred" subsequent to the decease of the defendants Fillmore's ancestor; and hence this testimony is within the first exception stated in the section named.

6. The assertion that there was a misjoinder of parties plaintiff will not be sustained. It has been said that "the court exercises a sound discretion, without adhering to any inflexible rule, in determining whether there has been a misjoinder of parties in equity": 1 Daniell's Chancery Practice, note 3, p. 303. The supposed misjoinder in this case is due to the admission of Macon into the firm of Wells and Smith after the employment began, thus in effect creating a new partnership. The object of both plaintiff firms was to secure a lien upon the same funds and the same premises for services rendered to the same parties in the same proceeding. Both firms, and the individuals composing them, were in exactly the same manner interested in the result of the suit and in the property sought to be subjected to the attorney's lien. Under these circumstances, and in view of the equitable principle above stated, we would hesitate in holding that there was such a misjoinder of parties plaintiff as rendered the complaint, or the proceeding in equity, obnoxious to objection, by demurrer or otherwise.

But it is unnecessary to further discuss or to determine this question of pleading. The alleged misjoinder appears on the face of the complaint. When the demurrer was overruled, appellants filed their answer and went to trial. By so doing, they waived their right to be heard in this court upon the present objection: Bliss on Code Pleading, sec. 417; *Tennant* v. *Pfister*, 45 Cal. 270; *Schoelkopf* v. *Leonard*, 8 Col. 159; *Webb* v. *Smith*, 6 Id. 365; *Green* v. *Taney*, 7 Id. 278.

7. As to the alleged conflict between the testimony of Wells, on one side, and Patterson, Irwin, and Charles on the other, it

is sufficient to say that, so far as there is any real and material inconsistency, the testimony of Wells is fortified by that of other witnesses, and also by circumstances in evidence. We would not feel justified in holding that the referee and the court erred in their finding as to the making and continuance of the original contract.

8. Finally, it is claimed that the compensation allowed in this case is excessive. The amount is large, but the services extended through a series of years, in different courts. Some of the questions litigated in the original suit seem to have been complicated and difficult. The result of the proceeding was a victory for the wards, and the fruits of the victory were upwards of twenty thousand dollars in value. Upon the question as to what would be a reasonable compensation for all the services rendered, ten disinterested witnesses were sworn as experts, all of whom rank among the leading members of the bar of the state. Eight of these experts estimated the value of such services at various sums, not less than six thousand dollars, nor more than eight thousand dollars; the two others estimated the same at from two thousand five hundred to three thousand dollars. It is evident that the referee and court found in accordance with the decided weight of expert testimony; and, under all the circumstances disclosed, we are not prepared to say that their finding and judgment are wrong.

We have not overlooked the fact that the attorney's lien statute, as adopted in 1861, readopted in 1868, and republished in 1876, contained the adverb or conjunction "when," instead of the relative pronoun "which" (found in the General Statutes), at the beginning of the last clause thereof. But this is a matter of no consequence, for with either of the words the legislative meaning is clearly the same. That body intended, in the part of the section referred to, to say that the lien conferred therein should be enforced by the proper civil action.

Perceiving no fatal error in the record before us, the decree of the district court will be affirmed.

ATTORNEY'S LIEN, ITS NATURE AND EXTENT, and to what judgment it attaches: See *Humphrey* v. *Browning*, 95 Am. Dec. 446, and note 454; *Forsythe* v. *Beveridge*, 4 Am. Rep. 612.

OBJECTION OF MISJOINDER OR NON-JOINDER of parties cannot be raised on appeal: *Beard* v. *Knox*, 63 Am. Dec. 125, and note. If not taken by de-

murrer or answer, it is deemed waived: *Donnell* v. *Walsh*, 88 Id. 361; *Adams* v. *Brannan*, 68 Id. 274, note 280.

FINDINGS OF COURT WILL NOT BE DISTURBED because of a conflict of evidence: *Lick* v. *Wadden*, 95 Am. Dec. 175; *Wilcoxson* v. *Burton*, 87 Id. 66, and note; *Erwin* v. *Shaffer*, 72 Id. 613; *Gabbert* v. *Jeffersonville R. R. Co.*, 71 Id. 358.

McPHEE *v.* O'ROURKE.

[10 COLORADO, 301.]

HOMESTEAD. — UNDER COLORADO STATUTE, the wife has the character of a head of a family, while occupying with her husband her property as a home, so as to enable her to designate and affect it with the character of a homestead, so as to exempt it from seizure and sale for the joint debt of herself and husband.

HOMESTEAD. — UNDER COLORADO STATUTE, the wife while occupying with her husband her property as a home may designate and affect it with the character of a homestead, so as to exempt it from seizure and sale, even when such designation is made for the purpose of preventing the joint creditor of the husband and wife from collecting his debt due him for material used in improvements upon the property before it was so designated as a homestead.

HOMESTEAD. — WHEN CONVEYANCE TO WIFE is made by the husband for the purpose of placing the home beyond the reach of his creditors, the wife is not precluded from claiming the benefit of the homestead statute, even as against such creditors.

ACTION to set aside a sale, and to enjoin a sheriff from making a deed to certain premises claimed as a homestead by Bridget O'Rourke, defendant here, but plaintiff below, who alleged in her complaint the ownership and possession of a certain house and lot in the city of Denver; that she had been seised and in the possession thereof since the first day of February, 1883; that from that time until April 17, 1883, she had been, and still remained, a householder, the head of a family, and occupied the premises with her family as a homestead; that on February 5, 1883, she duly registered and designated such premises as a homestead upon the records of the county, at the same time that the deed conveying the property to her was recorded; that on February 17, 1883, McPhee and McGinnity recovered judgment against herself and husband, Dennis, jointly, upon which execution issued to the sheriff of the county, who sold the premises on March 12, 1883, to McPhee and McGinnity, and issued to them a certificate of sale. Mrs. O'Rourke had judgment in the court below. Other facts are stated in the opinion.

Markham, Patterson, and Thomas, for the plaintiffs in error.

J. P. Brockway, for the defendant in error.

STALLCUP, C. By the record and argument three questions are presented for consideration: —

1. Under our statute concerning homesteads, has the wife the character of a head of the family, while occupying with her husband her property as a home, to enable her to designate and effect such home with the character of a homestead, so as to exempt it from seizure and sale for the joint debt of herself and husband? The first and fourth sections of the statute are as follows: —

"SEC. 1. Every householder in the state of Colorado, being the head of a family, shall be entitled to a homestead not exceeding in value the sum of two thousand dollars, exempt from execution and attachment arising from any debt, contract, or civil obligation entered into or incurred after the first day of February in the year of our Lord, 1868."

"SEC. 4. When any person dies seised of a homestead, leaving a widow, a husband, or minor children, such widow or husband or minor children shall be entitled to the homestead."

In the enactment of these provisions the legislature recognized a married woman as a person possessing to some extent the character of a householder and head of a family, though living with her husband. The purpose of the statute is to preserve the home for the family. When the wife is the owner of the property occupied as the home of the family, she is the only one capable of investing it with the exemption character provided by the statute. Under our statutes, the married woman never did occupy the dwarfed position that afflicted her under the common law. Since the act of our legislature of 1874, the married woman has been without disability concerning her property and property rights; and at the time of the passage of the homestead act in 1868, she owned and controlled all property she brought to the marriage independent of her husband, had power to carry on business in her own name, to sue and be sued as if single, and to acquire property by her earnings and business, and to hold the same as if single. So we conclude that in the nature of things, and in the legislative mind, the husband and wife both possess the character of a householder and head of a family, at least to the extent to enable either of them owning

the home they occupy as such to designate it as a homestead, and that the statute, as is clearly apparent from the language used in section 4 above quoted, is expressive of such view: Thompson on Homesteads, secs. 220–222.

2. Should the act designating the homestead operate as against a creditor for material used in improvements upon the property before it was so designated? As to this question, it is sufficient to say that there is no proviso in the statute against such operation. By failing to take the steps necessary to secure a lien upon the premises, under the provisions of our mechanic's-lien act, the right to subject the premises to such debt was lost.

3. Does it vitiate the homestead character of the property when the designation thereof as a homestead was for the purpose of preventing the creditor from collecting his debt? The purpose of the designation of the property as a homestead is to put it out of the reach of creditors while occupied as a home; and such purpose, and the consequent result of such designation, are warranted by the statute, though occurring after the debt was contracted, and immediately before the creditor had attached or levied upon the property, and though the debtor had no other property liable for his debt: *Barnett* v. *Knight*, 7 Col. 365. In no way does the statute rest upon the principles of equity, nor in any way yield thereto. By it we see the policy of the state is to preserve the home to the family even at the sacrifice of just demands, for the reason that the preservation of the home is deemed of paramount importance.

The exemption under the homestead act being confined to debts contracted after the passage of the act, it may well be said that there can be no superior or controlling equity in the premises, and he who gives credit does so with knowledge of the statute, and the purpose and policy thereof, as well as the additional risk thereby occasioned. And whether the title to the home be in the maternal or paternal head of the family, they occupy a position in relation to the state making it more important that such home should be preserved to them than that it should be taken to pay the legal demands against them collectible by attachment and execution. The duty and relation to the state in such case are of higher import than the duty and relation to such creditor. In the first section of his work on homesteads and exemptions, Mr. Thompson reproduces some expressions from eminent sources upon this view, as follows: "The late Senator Benton, advocating in the United

States senate the adoption of a general homestead policy, said: 'Tenantry is unfavorable to freedom. It lays the foundation for separate orders in society, annihilates the love of country, and weakens the spirit of independence. The tenant has, in fact, no country, no hearth, no domestic altar, no household god. The freeholder, on the contrary, is the natural supporter of free government, and it should be the policy of republics to multiply their freeholders, as it is the policy of monarchies to multiply their tenants.' 'There is,' said Tarbell, J., in a case in Mississippi, 'unquestionably, no greater incentive to virtue, industry, and love of country than a permanent "home," around which gather the affections of the family, and to which the members fondly turn, however widely they may become dispersed.' 'The law,' said the supreme court of Iowa, in an early case, 'is based upon the idea that, as a matter of public policy for the promotion of the prosperity of the state, and to render independent and above want each citizen of the government, it is proper he should have a home,—a homestead,—where his family may be sheltered and live beyond the reach of financial misfortune, and the demands of creditors who have given credit under such law. And this policy is characterized as "liberal" and "benevolent."'"

It is also contended by counsel for plaintiff in error that this property was acquired by the defendant in error, Bridget O'Rourke, by a conveyance from her said husband, Dennis O'Rourke, who was jointly indebted with her on the said demand of the said McPhee and McGinnity; that such conveyance was without consideration and in fraud of his creditors, the said McPhee and McGinnity; and that such conveyance should be held void, and the property applied to the discharge of his said debt; that it was not rightfully her property when she designated it as a homestead. Such are the premises for a creditor's bill in equity, the consideration of which is impracticable in this action by reason of the want of Dennis O'Rourke as a party to the action: *Allen* v. *Tritch*, 5 Col. 222. But even had the husband, Dennis O'Rourke, been made a party, the legal *status* of the parties here would remain unchanged. The judgment of plaintiffs in error was against both the husband and wife, Dennis and Bridget O'Rourke. The conveyance of the property from one to the other could in no way prejudice plaintiffs in error in the collection of their judgment, as it is not such a conveyance as one conveying the property to a person whose property would be beyond the reach of the judgment.

Besides, it has been held that when a conveyance to the wife is made or caused to be made by the husband for the purpose of placing the home beyond the reach of his creditors, the wife is not precluded thereby from claiming the benefit of the homestead statute, even as against such creditors: *Orr* v. *Schraft*, 22 Mich. 260; *Edmonson* v. *Meacham*, 50 Miss. 39. The decree should be affirmed.

MACON, C., and RISING, C., concurred.

By COURT. For the reasons assigned in the foregoing opinion, the decree of the superior court of the city of Denver is affirmed.

WHILE WIFE HAS BEEN HELD TO BE the head of the family in some instances (see note to *Wade* v. *Jones*, 61 Am. Dec. 587), Thompson on Homesteads and Exemptions, section 690, lays down the rule that the husband is the head of the family, and that while he is alive the wife cannot claim the benefit of the homestead exemption statute as to a forced sale against him, and it has been doubted if the wife could claim a homestead out of her separate property: *Revalk* v. *Kraemer*, 68 Am. Dec. 304, but see note 309, showing that the wife may be the head of the family.

VOLUNTARY CONVEYANCE FROM HUSBAND TO WIFE to hinder and delay his creditors does not affect her right to a homestead in the property: *Ruhe* v. *Hooke*, 31 Am. Rep. 642, and note; *Furrow* v. *Athey*, 59 Id. 867; *Riggs* v. *Sterling*, 1 Am. St. Rep. 554.

EVANS *v.* YOUNG.

[10 COLORADO, 316.]

WHEN LESSOR, BEING THE OWNER OF ENTIRE ESTATE, subject only to a lease, buys the leasehold, and thereby becomes vested with the entire estate, he does not thereby remove the encumbrance of a mechanic's lien created upon the leasehold estate during the tenancy, but the entire estate remains liable for the lien.

WHERE OWNER OF ESTATE UNITES the leasehold with the fee, and at the time of purchasing the leasehold has full knowledge of the existence of a mechanic's lien against it, no equitable consideration exists for the separation of the two estates, but an absolute merger will be held to take place, making the entire estate liable for the lien.

WHERE RECORD FAILS TO SHOW THAT JUDGMENT BY DEFAULT was not properly entered, the regularity of the proceedings will be presumed, and it will also be presumed that any notice required was given.

THIS action was brought by Young and Savin to foreclose and enforce a mechanic's lien against the Denver and Natatorium and Physical Culture Association, the Colorado Mortgage and Investment Company, J. H. Jones, and J. Evans. It appears that the lien was for building materials furnished

said Natatorium Association on premises held by it under a lease from Evans. The said mortgage company and Jones were made parties because a deed of trust conveying the leasehold to Jones had been made by the association for the purpose of securing a loan from the mortgage company to the association; and Evans was made party because he owned the estate subject to the lease, and was supposed to have acquired the leasehold by purchase. It also appears that at the time the loan was made, the association conveyed its leasehold interest in trust to said Jones as security, and that it assigned and delivered the lease to the mortgage company for the same purpose. The association failed to pay the loan when due, and the deed of trust was foreclosed, the mortgage company becoming the purchasers of the leasehold at foreclosure sale, subject to the mechanic's lien. Afterwards, the mortgage company paid the rent due, and for a valuable consideration sold and assigned their leasehold interest and delivered the lease to said Evans, thus vesting in him the leasehold and the fee. These facts appearing, the trustee and mortgagee were dismissed as parties, and judgment was taken by default against the association, to the extent of limiting the mechanic's lien to the leasehold estate, and a decree was entered in favor of said Evans, and against Young and Savin, from which decree an appeal was taken to the district court, where a referee found that said Evans purchased the leasehold with notice of the mechanic's lien against it, and that Young and Savin have a lien against the premises held by Evans. The referee prepared a decree to foreclose and enforce this lien, the court adopted the decree, and Evans appeals. Other facts appear in the opinion.

H. C. Dillon, for the appellant.

John L. Jerome, for the appellees.

STALLCUP, C. Counsel for appellant in their argument have arranged the errors assigned under three heads, and have accordingly presented the same for consideration.

1. It is argued that the lessee cannot bind the estate of the lessor with a lien. This proposition may be conceded; but when the lessor, being the owner of the entire estate, subject only to the lease, buys the said leasehold estate, and thereby becomes vested with the entire estate, and possession and control thereof, he does not thereby remove the encumbrance of a third party upon the estate so purchased. By so uniting the

two estates, the lesser estate became extinguished by sinking into the greater estate, leaving the lien resting upon the entire estate, unless the two estates for equitable purposes should be held and treated as being separate and distinct. From the evidence it appears that appellant sold and conveyed the entire estate. Having so done, it may be doubtful if he could thereafter be permitted to treat the leasehold estate and the fee as separate and distinct: *James* v. *Morey*, 2 Cow. 268; *Koenig* v. *Mueller*, 39 Mo. 165.

But the two estates, when owned by the same person, are only regarded in equity as separate when equitable considerations justify or require such action; and since appellant purchased the lease with full knowledge of the lien rights of appellees, and since the leasehold estate was of much greater value than the amount of the lien, as evidenced by the sum paid therefor by appellant, we are of the opinion that no equitable consideration exists requiring us to hold that an absolute merger did not take place: *Smith* v. *Roberts*, 91 N. Y. 476; *Koenig* v. *Mueller*, *supra*.

2. It is argued that the decree was invalid as to the Natatorium association, and consequently invalid as to appellant. This argument rests upon the assumption that judgment was rendered against the association without legal notice of the proceedings after appeal. Assuming that appellant has the right to question this part of the decree, we must declare the objection not well taken. The prayer for the appeal and order of the county court allowing the same are general, and covered the entire decree. Counsel for appellant do not question the right of Young and Savin to take the appeal in this way. They assume that the whole cause, by the appeal, was taken to the district court for a trial *de novo*. The decree in the district court, which is part of the record proper, recites the filing therein of the amended complaint, the answer thereto of appellant, and the entry of default against the association. There is nothing in the record to show that this default was not properly entered, and, in favor of the regularity of the proceedings, the presumption arises that any notice required was given. If notice was not given the association of the proceedings, the record does not show the fact; and if the record omits or misrecites any material matter, counsel should have procured a correction thereof.

3. It is argued that the decree was not supported by the evidence. It is contended, on the part of appellant, that the

evidence shows that the said building materials were not sold upon credit to the said association, but to one Griffith, and on this account there was no right to a lien. If such were the facts in the case, they might defeat the lien; but from the evidence adduced, the findings were against this view, and we see no reason to disturb such findings. It is also contended that the building provided for by the terms of the lease was not completed in the time therein specified, and the lease, by its terms, was subject to forfeiture. Be this as it may, the lease never was forfeited, and the leasehold estate never was so terminated, as no forfeiture was ever claimed or asserted by appellant. He preferred to acquire the estate by purchase, after receiving the rental to April 1st, thereby repelling any claim or intention of a forfeiture thereof; he then purchased the leasehold estate, together with the improvements and materials on the premises, and so received possession thereof. It is therefore apparent that he did not acquire the leasehold estate by forfeiture, but by purchase.

The decree should be affirmed.

MACON, C., and RISING, C., concurred.

By COURT. For the reasons assigned in the foregoing opinion, the decree of the district court is affirmed.

MECHANIC'S LIEN ATTACHES TO WHAT ESTATE: *Lyon* v. *McCaffey*, 45 Am. Dec. 675, and extended note 678–680; note to *Loomis* v. *Hogan*, 61 Id. 697.

SUPPLY DITCH COMPANY *v.* ELLIOTT.

[10 COLORADO, 227.]

LEGAL EFFECT OF PLEA OF TENDER is an irrebutable presumption of indebtedness to the extent of the tender; and when it is brought into court, that amount is considered as stricken from the complaint; and if more is claimed, plaintiff proceeds for the excess of his demand above the tender only.

DEMURRER ADMITS ALL MATERIAL FACTS WELL PLEADED, and all necessary intendments and inferences as to such facts as the demurrer applies, but all facts not alleged in the pleading attacked by demurrer or necessarily inferred are assumed not to exist.

ARGUMENTATIVE PLEADING IS BAD under all systems of practice.

RELATION OF STOCKHOLDERS TO CORPORATION whose stock they hold is that of contract, and all the rights and duties of both parties grow out of contract implied in the subscription for stock, construed by the provisions of the charter or articles of incorporation.

CORPORATION IS TRUSTEE FOR ITS STOCKHOLDERS, and is bound to protect their interests.

CERTIFICATES OF STOCK ARE ASSIGNABLE, and pass by indorsement as bills of exchange and promissory notes pass, and holders of such certificates are *prima facie* presumed to be the *bona fide* owners, and an innocent purchaser thereof for value will hold them against the true owner, where the latter has placed it in the power of the assignor to perpetrate a fraud upon the innocent assignee.

CORPORATION IS ORDINARILY JUSTIFIED in treating the assignee and holder of certificates of stock as the legal and equitable owner thereof.

TRANSFER OF STOCK BY CORPORATION upon its books, in the absence of the original certificate, is made at its peril, and the real owner of the stock, evidenced by such certificate, loses nothing thereby. But upon the stock so issued by wrong or mistake, the corporation is liable to a *bona fide* holder thereof.

Dolloff and Rittenhouse, for the plaintiff in error.

B. L. Carr, for the defendant in error.

MACON, C. From the admissions of the pleadings in this case, the following facts appear: During and prior to the year 1883, plaintiff in error was an incorporated ditch company, owning an irrigating ditch, and having its capital stock divided into shares, each of which entitled the holder thereof to take from said company ditch ten inches of water for irrigating purposes, upon the condition that he applied for such water before or by the twentieth day of May of the year in which he desired to use the water, and pay or secure to the company the sum of one dollar per inch for all the water he might use. In 1879, one Moyer owned two shares of the stock of plaintiff in error, and pledged the same to one I. M. Phillips in trust to secure the payment of a debt due from him to one John Phillips. When this pledge of stock was made, the certificates thereof had not been issued by the company, but the company was advised of the nature of the transaction between Moyer and Phillips, and recognized the right of Moyer to the stock by allowing him to use water and vote at meetings of the company. It seems that no certificates for these shares were issued by the company until the twenty-eighth day of September, 1882, when the company, without the consent of Moyer, issued two certificates for his stock to I. M. Phillips, numbered respectively 385 and 386. Before the issuance of the certificates to I. M. Phillips, and on the eighteenth day of September, 1882, Moyer assigned absolutely these two shares of stock to defendant in error, Elliott; but no notice of such assignment was given to the company by Elliott, or any other person until some time in June, 1883.

In January, 1883, one Yates sued I. M. Phillips, and in the statutory way attached these two shares of stock, and on the eighth day of February, 1883, the same were sold by the sheriff of Boulder County under the judgment obtained by said Yates against said I. M. Phillips, and one C. J. Buck became the purchaser thereof, who, on the next day, left with the secretary of the company a copy of the certificate of sale issued to him by the sheriff, which was by said secretary placed on file in the proper book of the company. When Yates brought his suit, and when the sale was made to Buck of these shares, both Yates and Buck had notice of the extent and character of I. M. Phillips's interest in said shares of stock.

On the nineteenth day of May, 1883, defendant in error, Elliott, applied to plaintiff in error for twenty inches of water, in addition to thirty inches to which he was entitled under three shares of stock in the plaintiff company, but did not inform it of his ownership or claim of right to the Moyer shares, and left the company in ignorance of his claim thereto, and tendered twenty dollars for the additional water demanded, which demand and tender were refused by plaintiff in error. Again, about the 1st of June following, Elliott produced to the plaintiff in error an order in writing from said Moyer, directing the company to transfer on its books to him (Elliott) the said two shares of stock, and about the same time both I. M. and John Phillips, in writing, directed the company to make such transfer to said Elliott, and release to him all their interest and right in and to said stock. Upon the presentation of these orders to the company, Elliott demanded the transfer of the stock to him on the company books, but made no demand for water; nor did he tender payment or security to the company for the twenty inches of additional water demanded on May 19th.

When this demand was made by Elliott for the transfer of the said stock, the two certificates numbered 385 and 386, before that time issued to I. M. Phillips, were still in the possession of said Phillips, and were not produced to the company by either Elliott or Phillips, and no offer was made to surrender such certificates at that time nor until about the thirteenth day of July following. The company refused to make such transfer to Elliott; and, after the refusal of the company to transfer this stock to Elliott (but at what date does not appear), defendants in error took forcibly, and against the will of the company, twenty inches of water under Elliott's

claim of right to the said Moyer stock; for the taking of which this action was brought.

Defendants answered, and set up four distinct defenses: 1. That they did not take the water unlawfully; 2. That plaintiff was not damaged, as alleged in the complaint; 3. Admitting the taking of the water, but justifying under a claim of five shares of stock in the plaintiff company, two of which were the said Moyer shares; and 4. Setting out all the facts on which said Elliott's right to the stock was based, and the other facts which have already been stated in this opinion; and brought into court the sum of twenty dollars as the price and value of the water taken and used by them, and for which this action was brought. Plaintiff replied to the third defense, admitting said Elliott's ownership to three shares of stock, as alleged by him in said defense, but denied his ownership to more than the three shares, and to the fourth defense filed its demurrer; the court overruled the demurrer, and plaintiff electing to stand thereby, the court rendered judgment for defendants, that the suit be dismissed, and that they be allowed to take out of court the twenty dollars which they had tendered.

In defending the action, defendants relied upon Elliott's ownership of the Moyer stock, and the right to twenty inches of water thereunder, as a contract right growing out of the relation of said Elliott to the plaintiff company as a stockholder therein. He relied upon his right as a contract right, by virtue of the stock, and a compliance with the regulations of the plaintiff set up in his fourth defense. If Elliott had been the owner of the stock, and the company had accepted the tender of twenty dollars made to it by him on the 19th of May, 1883, he would have been entitled to water, upon proper application or proceeding therefor; and the defense rests upon the assumption that he was such owner, and that the tender made was equivalent to payment of the water dues. Having used the water after tender, and brought the money into court, they acknowledged that they were indebted to the company to that extent, and the duty of payment.

It is evident that, in its judgment, the court sustained defendants' defense, recognizing his contract rights, and held the tender equivalent to payment, and that by the tender the defendants were the owners of so much water, which they had taken from the ditch of plaintiff and used. The legal effect of a plea of tender is an irrebuttable presumption of indebtedness to the extent of the tender; and when the tender is brought

into court for the use of plaintiff, that amount is considered as stricken from the complaint; and if more is claimed by plaintiff, he proceeds for the excess of his demand above the tender only: *Bank* v. *Sutherland*, 3 Cow. 336; *Spalding* v. *Vandercook*, 2 Wend. 431; *Johnston* v. *Insurance Co.*, 7 Johns. 315; *Hubbard* v. *Knous*, 7 Cush. 556. After a plea of tender, a plaintiff may be nonsuited in proceeding to recover beyond the tender: *Jenkins* v. *Cutchens*, 2 Miles, 65; *McCredy* v. *Fey*, 7 Watts, 499. From this position, it follows inevitably that, if the court were right in finding the defense made out, it erred in adjudging the money brought into court in support of the tender of May 19th to defendants. The effect of the judgment, in such case, was to give to defendants under the contract both the water and the money, which, by their fourth defense, they confess the payment or security of was a condition precedent to their right to use the water. But as we shall hereafter see, defendant wholly failed to sustain his alleged defense.

The first assignment of error — "that the court erred in overruling the plaintiff's demurrer to the further and separate answer and defense contained in defendants' answer" — presents a question that will be best disposed of by first referring to a few rules and principles of pleading, and to some of the settled rules of the law of corporations.

As to the rules of pleading which it is necessary to examine here, it may be said that it is elementary that a demurrer admits all the material facts well pleaded in the pleading to which the demurrer applies, and all the necessary intendments and inferences of and from such facts, but no more; and that as to all facts not alleged in a pleading attacked by a demurrer, or arising from necessary inference out of the facts alleged, they are assumed not to exist: *Jones* v. *Latham*, 70 Ala. 164, in which case a demurrer was filed to a bill in equity, and the court held the following language: "It is our duty to construe the bill most strongly against the pleader, and on such a motion as this, to hold that every material fact not averred does not exist," citing *Cockeral* v. *Gurley*, 26 Id. 405; *Lucas* v. *Oliver*, 34 Id. 631. In the next place, argumentative pleading is bad under all systems of pleading in this country. The application of these rules will be made further on in this opinion.

The law of corporations applicable to the questions under discussion will be stated in a few words: —

1. The relation of stockholders to the corporation whose stock they hold is that of contract; and the rights and duties of both parties grow out of contract, implied in a subscription for stock, construed by the provisions of the charter or articles of incorporation.

2. The corporation is a trustee for its stockholders, and is bound to protect their interests: 1 Morawetz on Corporations, sec. 237, and cases cited; *Lowry* v. *Bank*, Taney, 310; *Bayard* v. *Bank*, 52 Pa. St. 232; *Atkinson* v. *Atkinson*, 8 Allen, 15; *Shaw* v. *Spencer*, 100 Mass. 382; *Fisher* v. *Brown*, 104 Id. 259; *Duncan* v. *Jardon*, 15 Wall. 165.

3. Certificates of stock are assignable, and pass from hand to hand by indorsement, as bills of exchange and promissory notes pass, and holders of such certificates are *prima facie* presumed to be the *bona fide* owners thereof, and an innocent purchaser thereof for value will hold them against the true owner, where the latter has placed it in the power of the assignor to perpetrate a fraud upon the innocent assignee: *Lanier* v. *Bank*, 11 Wall. 369. In that case, Justice Davis, speaking for the court, says: "The power to transfer their stock is one of the most valuable franchises conferred by Congress upon banking associations. Without this power, it can readily be seen, the value of the stock would be greatly lessened, and obviously, whatever contributes to make the shares of stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less to the interest of the shareholder than the public that the certificate representing his stock should be in a form to secure public confidence; for without this he could not negotiate it to any advantage. It is in obedience to this requirement that stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they become the basis of commercial transaction in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form nor character negotiable paper, they approximate to it as nearly as practicable. If we assume that the certificates in question are not different from those in general use by corporations (and the assumption is a safe one), it is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told, under the seal of the corporation, that the share-holder is entitled to so much stock, which can be transferred on the books of the

corporation in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know that whoever in good faith buys the stock and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates."

4. A corporation is ordinarily justified in treating the assignee and holder of certificates of stock as the legal and equitable owner thereof: *Lanier* v. *Bank*, *supra*.

5. Any transfer of stock by a corporation upon its books, in the absence of the original certificate, is made at its peril, and the real owner of the stock, evidenced by such certificate, losses nothing thereby; but upon the stock so issued by wrong or mistake, the corporation is liable to a *bona fide* holder thereof: *Davis* v. *Bank*, 2 Bing. 393; *Pollock* v. *Bank*, 7 N. Y. 274; *Cohen* v. *Gwynn*, 4 Md. Ch. 357; *In re Railway Co.*, L. R. 3 Q. B. 584; *Donaldson* v. *Jaillot*, L. R. 3 Eq. 374; *Sewall* v. *Boston W. P. Co.*, 4 Allen, 277.

Testing the admitted facts of this case by these rules of law, it is manifest that the demurrer to the fourth defense ought to have been sustained. When, on the nineteenth day of May, 1883, defendant in error, Elliott, applied for the water, and tendered the twenty dollars, the company did not know he was the owner of this Moyer stock, and he did not so inform it. He did not even declare himself to be such owner, and exhibited no evidence of title. He did not then demand a transfer of the stock to himself on the company books, but made his request for water, as a mere stranger desiring to buy so much water. We say this, because in the answer there is no averment that Elliott informed the company of his rights in the premises, either orally or by any written evidence; nor does it appear that at that time he made any demand for a transfer of the stock to himself, nor presented the certificates he claimed by assignment from Phillips.

To assume from the averments of the cross-complaint that he did so would be the most vicious kind of argument, which no court will make in favor of the pleader. The absence of all allegations to that effect, by the sound rules of pleading, require the assumption that no such facts existed, and the company was bound, in the absence of such evidence, from its duties to its stockholders, to refuse to recognize Elliott as the

owner of the stock, and was justified in refusing to permit him to take any more water from the ditch than he was entitled to under the three shares of stock admitted to belong to him. If on that occasion Elliott did submit to the company proper evidence of his title, he should have so alleged in his pleading. The company, therefore, was not in default in refusing to accept the tender of twenty dollars, and to permit Elliott to take the water for which he applied, and if not in default, then defendants in error were not justified in taking the water as they did. Hence, unless the conduct of the plaintiff in error in refusing, on the first day of June, 1883, to transfer the stock to defendant in error, Elliott, was so far wrong as to justify defendants in their conduct,—if trespass could be excused,—there is nothing in the case to relieve them from the charge of trespass upon the property of plaintiff in error. To determine this question, a brief review of the transactions of June 1st, between the company and the defendant in error Elliott, Moyer, and the two Phillipses, is necessary. From the admitted averments of the cross-complaint, it appears that on June 1st Elliott did not demand water under these shares, nor offer to pay for it, but only required the transfer of the stock to himself; that he did not then have in his possession the two certificates for this stock, but that they were in the possession of I. M. Phillips; that the latter did not, until about six weeks after this demand by Elliott, surrender these two certificates to the company for Elliott's benefit. As has been seen, a corporation always acts at its peril in issuing stock to an alleged assignee thereof, in the absence of the assigned certificates, because, if new certificates of stock are issued without the surrender of the old ones, and such new stock passes into the hands of an innocent purchaser, it will be good in his favor against the corporation.

Here, then, on June 1st, a demand was made on the company for a transfer of this stock, upon the order of Moyer and the two Phillipses, but the certificates were not produced, and no excuse or explanation was given for their non-production. When, on the books of the company, was recorded the certificate of sale of this same stock to Buck on February 8th preceding? The company did right in refusing to make the transfer. But if the missing certificates had been produced, and offered for cancellation, and the transfer had been made, such act alone would not have entitled defendants in error to the water. They still had to pay, or offer to pay, or secure

the twenty dollars due the company for the water before they could lawfully demand it. This they failed to do, and by reason of such failure they could have no right to withdraw water from the ditch, and in doing so were trespassers.

The court erred in overruling the demurrer to the cross-complaint; and for this, the judgment must be reversed, and the cause remanded, with directions to proceed according to law.

RISING, C., and STALLCUP, C., concurred.

By COURT. For the reasons assigned in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for a new trial.

PLEA OF TENDER, EFFECT OF: *Davis* v. *Millaudon*, 8 Am. Dec. 517, note 523; note to *Moynahan* v. *Moore*, 77 Id. 483, 484.

DEMURRER ADMITS ALL FACTS in declaration which are well pleaded: *Chicago etc. R. R. Co.* v. *Sweet*, 92 Am. Dec. 206; *Tinsman* v. *Belvidere etc. R. R. Co.*, 69 Id. 565, and note 580.

STOCK SUBSCRIPTION IS CONTRACT between corporation and subscriber, and courts will enforce it: *Blunt* v. *Walker*, 78 Am. Dec. 709, note 719; *Edinboro Academy* v. *Robinson*, 78 Id. 421.

SHARES OF STOCK ARE ASSIGNABLE: *Sargent* v. *Franklin Ins. Co.*, 19 Am. Dec. 306; *Commercial Bank* v. *Kortright*, 34 Id. 317, note 329.

CORPORATION IS NOT TRUSTEE for stockholders for what purpose: *Hodges* v. *New England Screw Co.*, 53 Am. Dec. 624, and see note treating the subject 637.

CITY OF DENVER *v.* DEAN.

[10 COLORADO, 375.]

MUNICIPAL AUTHORITIES OF CITY must exercise ordinary care in keeping the sidewalk free from defects and obstructions, and a failure to perform this duty may lay the foundation of municipal liability.

WHERE CITY DID NOT CONSTRUCT SIDEWALK, a defect in which caused an accident not occasioned by any act of the city, its officers or agents, before a recovery can be had it must be proved that the corporation had notice of the defect, and also that it was in possession of such notice a sufficient length of time before the accident to have cured the defect and prevented the injury. Such notice might be actual or constructive.

PERSONAL KNOWLEDGE OF OFFICER OF CITY gained in pursuance of his duties of defects in or obstructions to the sidewalks in such city is actual, but not constructive, notice to the city.

MUNICIPAL CORPORATION MAY BE CHARGED WITH CONSTRUCTIVE NOTICE of defects in its sidewalks so as to be held liable for injury caused thereby, either where an exercise of ordinary care on its part or the part of its officer involves the anticipation of defects that are the natural and legitimate result of use or climatic influences, or where the corporation had

the means of knowledge for a sufficient time to have remedied the defect. The phrase "means of knowledge" includes cases of neglect to anticipate and prevent certain defects mentioned above.

IN ACTION AGAINST CITY FOR INJURY resulting from defective sidewalk, it is within the province of the jury to determine whether or not the city or its proper officer had personal knowledge of the defect for a sufficient length of time previous to the injury to make the city liable.

ACTION against a city for damages. Dean, while walking along the sidewalk in the daytime, stepped upon the covering to a coal-hole, causing it to tip, and allowing one of his legs to pass through in such manner as to cause an injury resulting in serious personal consequences. There was nothing about the covering of the coal-hole to indicate danger to the careful or casual observer, and the injury arose from neglect to properly secure such covering. Dean at the time of receiving the injury was exercising reasonable care and caution. The chief of police of the city knew of the defect several months before the accident happened, and had notified and instructed the tenants to have the defect cured, he had also mentioned it to the policeman stationed on that beat. The other facts appear from the opinion.

F. Tilford, R. H. Gilmore, J. F. Shaffroth, and J. C. Stallcup, for the appellant.

Browne and Putnam, for the appellee.

By Court, HELM, J. It was the duty of the municipal authorities of Denver to exercise ordinary care in keeping the sidewalks free from defects and obstructions. The conclusion reached in *City* v. *Dunsmore*, 7 Col. 328, with reference to streets, applies with equal fitness to the subject of sidewalks, and the reasons there given need not be restated. A failure to perform this duty might lay the foundation of municipal liability. But since the city did not construct the sidewalk, coal-hole, or cap here in question, and the accident was not occasioned by any act of the city, its officers or agents, before plaintiff could recover damages from it for the injury sustained, he was required to show that the corporation had notice of the defective cap; also that it was in possession of such notice a sufficient length of time before the accident to have cured the defect and prevented the injury. Such notice might have been either actual or constructive.

The ninth instruction given in the case announces two propositions on the subject of notice: 1. That the knowledge,

concerning defects like the one in question, of the police of the city is not actual notice to the corporation; 2. That such knowledge, if gained in pursuance of the officer's duties and employment, may be the means of knowledge, so as to charge the municipality with constructive notice. In our judgment, both propositions are wrong. Whether a certain matter is in the line of a particular officer's employment, is to be determined by construction of the statute or ordinance prescribing his duties; hence such determination is a question of law. Without discussion, but not without careful examination, we are prepared to hold that the ordinance before us sufficiently charges the chief of police with the care of coal-holes and caps, as well as other obstructions, in or upon the sidewalks. Hence the court below should have instructed the jury that if the officer had personal knowledge of the defective cap the city should be charged with actual notice; and that if such actual notice existed for a length of time reasonably sufficient to have had the cap properly bolted before the accident, they might find for plaintiff, provided other essential questions of fact were, upon the evidence, resolved by them in his favor. But the knowledge of the chief of police could not, in and of itself, be constructive notice to the city; nor could the city be charged with this kind of notice by the communication of such knowledge to others. If information of a latent defect possessed by the chief of police were not acquired in the line of his official employment, but were communicated by him to some officer charged with the duty of repairing, or causing to be repaired, such defects, the notice to the city would be actual, and not constructive; while if, in such case, the chief repeated the information to private citizens, or to other officials, whose duties, like his, in no way related to the matter, the city would, in law, be charged thereby with no notice at all, either actual or constructive: 1 Dillon on Municipal Corporations, note 1, sec. 237, and cases; note to *Bank* v. *Whitehead*, 36 Am. Dec. 189; 2 Dillon on Municipal Corporations, sec. 1025, and notes.

There seem to be but two ways in which a municipal corporation can be charged with constructive notice of defects in its sidewalks so as to be held liable for injuries occasioned thereby, there being no municipal responsibility in the original construction, and no affirmative municipal acts through which the defects are produced: 1. Where an exercise of ordinary care on its part involves the anticipation of defects that

are the natural and legitimate result of use and climatic influences. A neglect of the proper officer to make a sufficiently frequent and careful examination of a particular structure is sometimes held to charge the city with constructive notice, even though the defect be latent. Illustrating this kind of constructive notices are such cases as *Furnell* v. *City*, 20 Minn. 117, and *Rapho and West Hempfield Tps.* v. *Moore*, 68 Pa. St. 404, where the respective injuries resulted from decayed stringers under the sidewalk and rotten timbers in the bridge. The timbers were sound when put into the sidewalk and bridge, but both had been in use so long that decay might reasonably be expected. The defects in both instances were only discoverable by a skilled and careful inspection. It is not contended that the principle above stated, underlying this class of cases, is applicable to the case at bar. 2. Constructive notice also exists where the corporation has had the means of knowledge for a sufficient time to have remedied the defect. The finding of the jury for plaintiff in the case at bar must, under the ninth instruction, have been based upon the proposition that the knowledge of Lomery was means of knowledge to the city, and that the city was thereby charged with constructive notice of the defective cap. It may be that the phrase "means of knowledge" fairly includes cases of neglect to anticipate and prevent certain defects,—cases covered by the foregoing discussion; but with that exception, we think the phrase applicable only to visible defects or obstructions,—defects or obstructions that are open and notorious; "so notorious as to be observable by all": Shearman and Redfield on Negligence, secs. 148, 407, and cases; 2 Dillon on Municipal Corporations, note 3, sec. 1026, and cases; *Weisenberg* v. *City of Appelton*, 7 Am. Rep. 43, note, and cases. Illustrating the inference of notice through "means of knowledge" are cases like that of *Dewey* v. *City*, 15 Mich. 306, where the injury resulted from an uncovered coal-hole, and that of *Mayor* v. *Sheffield*, 4 Wall. 189, where it was caused by a stump left projecting through the sidewalk.

But it is conceded by both parties to this case that the defect now under consideration was latent. In the undisputed language of the complaint, "there was nothing in the appearance of the coal-hole or its surroundings to indicate danger to the most careful observer." Therefore, aside from the fact that the knowledge of Lomery, as a city official, could not be means of knowledge to the city, it cannot be said that there

was anything else before the jury to constitute such means of knowledge.

We are not permitted to hold that the errors of the court in the ninth instruction were without prejudice to appellant. Though, under a proper statement of the law, the jury might perhaps have found the city charged with actual notice, it is not for us to say that such must have been their conclusion. It was their province to determine whether or not the chief of police did have personal knowledge of the defective cap, and also whether such knowledge, if found to exist, had been acquired a sufficient length of time previous to the accident: 2 Dillon on Municipal Corporations, sec. 1026. It does not necessarily follow, because the jury, under the law as submitted to them, found from the conduct and declarations of Lomery and others that the city had means of knowledge and therefore constructive notice, that under a proper instruction they would have Lomery possessed of adequate information for a sufficient period to charge the city with actual notice.

For the errors mentioned, judgment must be reversed, and it is unnecessary to discuss the remaining assignments.

WHERE CITY HAS POWER TO REPAIR SIDEWALK, and has allowed the same, unsafe in construction and built without its authority, to so remain for a year, it is liable for injury caused thereby: *Saulsbury* v. *Village of Ithaca*, 46 Am. Rep. 122.

IN ACTION AGAINST CITY FOR DAMAGES FOR INJURY sustained from a defective highway, it must be shown that the city authorities had notice of the defect, or that it was of such nature and had existed for such a length of time that knowledge on their part must be presumed: *Requa* v. *City of Rochester*, 6 Am. Rep. 52; *Goodnough* v. *Oshkosh*, 1 Id. 202; see *Colley* v. *Westbrook*, 2 Id. 30.

NOTICE TO OFFICER OF DEFECT IN STREET is notice to the city: *City of Logansport* v. *Justice*, 39 Am. Rep. 79, and note 84.

LIABILITY OF CITY TO KEEP STREETS IN REPAIR: *Browning* v. *City of Springfield*, 63 Am. Dec. 345, and note 350–357.

CALDWELL v. DAVIS.

[10 COLORADO, 481.]

RELATION EXISTING BETWEEN PARTNERS IS ONE OF TRUST and confidence; and when dealing with each other in relation to the partnership matters, they are required to make full disclosure of all material facts within their knowledge in any way relating to the partnership affairs.

COMMUNITY OF INTEREST EXISTS BETWEEN PARTNERS, producing a community of duty.

WHEN CONTRACTING BETWEEN THEMSELVES, PARTNERS ARE REQUIRED to show the utmost good faith toward each other, and the concealment of material facts by one, which he should disclose to the other, is a fraud for which the contract may be canceled.

TO ENTITLE PARTY TO PROTECTION accorded to privileged communications, they must be made to the counsel, attorney, or solicitor acting, for the time being, in the character of legal adviser, and must be made by the client for the purpose of professional advice or aid upon the subject of his rights and liabilities.

ACTION to set aside and to have declared fraudulent and void a certain partnership contract. The facts are sufficiently stated in the opinion.

T. J. O'Donnell, for the appellant.

J. F. Vaile, for the appellee.

RISING, C. The numerous assignments of error will not be separately discussed; but under a general consideration of the case, the rulings of the court below, upon which the errors are assigned, will be passed upon.

The first and most important question for consideration is that of the sufficiency of the evidence to entitle the appellant to the relief demanded. Appellant bases his right of relief upon the conduct of the appellee; and how far the conduct of the appellee affects such right must be determined by the relations of the parties to each other. The plaintiff alleges that they were copartners for the purpose of buying and selling an option on certain mining claims. Under the decision in *Kayser* v. *Maugham*, 8 Col. 232, the evidence in this case fully establishes the allegation. The relation existing between partners is one of trust and confidence: Pomeroy's Eq. Jur., sec. 963. Partners, when dealing with each other in relation to partnership matters, are required to make full disclosure of all material facts within their knowledge, in any way relating to the partnership affairs. A community of interest exists between the partners, and a community of interest produces a community of duty. This community of interest, by the terms of the

bond and the agreement of the parties, was to continue until the twenty-second day of July. The bond having been obtained for the purpose of selling the option so acquired at a profit, for the joint benefit of appellant and appellee, a joint duty and obligation rested upon each, during the full time the bond had to run, to work for the accomplishment of such purpose. We think the evidence clearly shows that appellee did not perform this duty; that prior to appellant's return from the east, appellee had negotiated a sale to Ohlwiler of one-half interest in the property for his own exclusive benefit; that he deliberately planned to obtain appellant's interest in the bond to enable him to carry out his negotiations with Ohlwiler; that he intentionally concealed from appellant all knowledge of his negotiations with Ohlwiler, and he led appellant to believe that he wanted appellant's interest in the bond for the sole purpose of enabling him to put up the money and take the property.

In Story's Eq. Jur., sec. 329 a, it is said: "When the contract is between those who sustain, or have lately sustained, any intimate and confidential relation, the law presumes the existence of that superiority and influence on the one part, and that confidence and dependence on the other, which is the natural result of the relation, and will accordingly decree the cancellation of the contract, unless it appear affirmatively to have been equal and just." In the making of this contract the parties were not on equal footing. Davis had knowledge of facts relating to the sale of the property which Caldwell did not have, and which knowledge equity and fair dealing required of him to disclose to Caldwell, because such knowledge was obtained under circumstances which made it the common property of himself and Caldwell. The concealment of or the failure to disclose these facts to Caldwell made Davis guilty of an actual fraud: Pomeroy's Eq. Jur., sec. 901; Story's Eq. Jur., sec. 308; *Dambmann* v. *Schulting*, 75 N. Y. 55, 61.

The contract between Davis and Caldwell was unequal in that it enabled Davis to obtain all the benefits under their joint undertaking, and unjust in that such benefits were so obtained by reason of the suppression by Davis of facts which it was his duty to disclose.

In *Fitzsimmons* v. *Joslin*, 21 Vt. 129, 138, Redfield, J., in commenting upon conduct of this nature, says: "Can it be said, then, that when one party acts under a misconception of

the facts most material to the contract, which are known to the other party and studiously kept back, knowing that the other side is acting under this delusion, can it be said that such contract is binding, at the bar of conscience, or, indeed, in moral or legal justice? I trust not."

In making the sale to Davis, Caldwell was acting under misconception of most material facts. He was led to believe that a joint sale for the joint benefit of himself and Davis could not be made at a time when the only impediment in the way of a complete sale for the joint benefit of the parties was the desire and intention of Davis to obtain the full benefits of such sale for himself alone. Davis was under a legal as well as a moral duty and obligation to place Caldwell in possession of all information he had obtained relating to the sale or probable sale of the bonded property, during the existence of the copartnership, before he attempted to contract with Caldwell for his interest; and because of his failure to perform this duty and obligation, the contract should be canceled.

The evidence fails to disclose such laches on the part of plaintiff in the bringing of his suit as will defeat his right to relief.

The question of tender is met by the allegations of the complaint that plaintiff offers to pay to the defendant, his copartner, what, if anything, should be found due from plaintiff to defendant upon an accounting and settlement of the partnership affairs, and demanding that such accounting be had, and charging the fact to be that the defendant will be found to be his debtor on such accounting. If, in fact, the defendant is indebted to the plaintiff in a sum equal to the amount defendant paid for the assignment of plaintiff's interest, we see no reason why the court of equity should require a further tender to be made: *Watts* v. *White*, 13 Cal. 321.

The question of laches by the plaintiff in bringing his suit was made an issue by the pleadings, and the seventh, eighth, ninth, and tenth assignments of error are based upon the rulings of the court in the rejection of the testimony offered by the plaintiff upon this issue. There was no exception to the ruling of the court upon which the eighth assignment is based. In view of our conclusions upon another branch of the case, it is not necessary to discuss these assignments. The question of laches must be determined upon the knowledge of the plaintiff, and his diligence in obtaining knowledge of the facts

upon which his right to relief rests. There was no such laches on his part as will defeat his right to relief.

The errors assigned upon the ruling of the court in rejecting testimony of the witness Letcher may all be considered together; the objection to each of the questions being based upon the proposition that the matter inquired about consisted of privileged communications by Davis, as client, to Letcher as his attorney. It appears from the evidence that Davis went to Letcher between the seventh and tenth days of July, 1880, with one of the Nortons and Mr. Rutan, at which time Letcher drew a release of warranty from Davis to the Nortons and Rutan, or to one of them, and that afterwards he drew a deed, and examined the title to the bonded property. Letcher further says that he presumes the deed he drew was the result of conversation had between Davis, Ohlwiler, Rutan, and the Nortons at his office. To entitle a party to the protection accorded to privileged communications, the communications must have been made to the counsel, attorney, or solicitor acting, for the time being, in the character of legal adviser, and must be made by the client for the purpose of professional advice or aid upon the subject of his rights and liabilities: 1 Greenl. Ev., secs. 239, 240. The evidence does not show that any communications had been made by Davis to Letcher, as his legal adviser, upon the subject of his rights and liabilities. The only employment of Letcher by Davis was to draw the release and deed. In drawing these instruments, Letcher acted as a scrivener merely, bringing this case directly within the ruling in *Machette* v. *Wanless*, 2 Col. 169, 179. In this case, as in *Machette* v. *Wanless*, the evidence does not show that Letcher was an attorney.

The witness was questioned as to the conversation between Davis and other persons in his presence, concerning matters not relating to his employment, and which were not communications made to him, and as to which no confidence was reposed in him. The court erred in sustaining the objections made to the questions put to the witness Letcher, excepting the one upon which the fourteenth assignment is based.

The judgment should be reversed, and the cause remanded in conformity with the views herein expressed.

MACON, C., and STALLCUP, C., concurred.

By COURT. For the reasons assigned in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded.

SOLE MANAGING PARTNER'S RELATION TO COPARTNER is one of great confidence, and requires good faith: *Laffan* v. *Naglee*, 70 Am. Dec. 678.

PRIVILEGED COMMUNICATION, WHAT IS: *House* v. *House*, 1 Am. St. Rep. 570, and note.

WHEELER *v.* NORTHERN COLORADO IRRIGATION CO.

[10 COLORADO, 582.]

ALTERNATIVE WRIT OF MANDAMUS must state a cause of action, and failing to do so, it will not support a judgment. Its legal sufficiency may, by return or answer, be challenged as upon demurrer, and tested under rules of pleading applicable to complaints when assailed by demurrer.

COLORADO CONSTITUTION DEDICATES ALL UNAPPROPRIATED WATER in the natural streams of the state to the use of the people, the ownership being in the public, and it guarantees the right of division and appropriation for beneficial purposes.

COLORADO CONSTITUTION, WITH CERTAIN QUALIFICATIONS, recognizes and protects prior right of user acquired through priority of appropriation.

TITLE TO WATER APPROPRIATED, save, perhaps, the limited quantity actually flowing in the consumer's ditch, remains in the general public, while the paramount right to its use, unless forfeited, remains in the appropriator, under the Colorado constitution.

TO CONSTITUTE LEGAL APPROPRIATION, WATER DIVERTED must be applied within a reasonable time to a beneficial use.

DIVERSION OF WATER RIPENS INTO VALID APPROPRIATION only when the water is utilized by the consumer, though priority of appropriation may date, proper diligence having been used, from the commencement of the canal or ditch.

APPROPRIATOR DOES NOT BECOME PROPRIETOR of water diverted, though he acquires certain peculiar rights therein; the public are still entitled to its use upon paying reasonable compensation therefor.

UNDER COLORADO CONSTITUTION, ONE TRANSPORTING FOR HIRE WATER owned by the public to those entitled to its use is a *quasi* public servant or agent, charged with a public duty or trust, and an attempt to use his monopoly for the purpose of coercing compliance with unreasonable and exorbitant demands lays the foundation for judicial interference and regulation.

CARRIER TRANSPORTING WATER FOR HIRE cannot charge the consumer for exercising his constitutional right to use the water, nor can it collect a part of its annual transportation charge in advance for the remaining years of its corporate life as a condition precedent to the use of the water. While it is entitled to reasonable compensation, such charge is illegal, unreasonable, and oppressive.

MANDAMUS WILL LIE TO ENFORCE the constitutional right of a consumer to the use of unappropriated water, or water undisposed of, for the current year, on payment of reasonable transportation charges to the carrier, in the absence of statutory or other law affording relief.

ALTERNATIVE MANDAMUS CANNOT BE SO AMENDED as to allow the substitution in the same action of a new and wholly different cause of action.

APPEAL from order and judgment sustaining a demurrer to an alternative writ of *mandamus*. The opinion states the other facts.

L. C. Rockwell, C. W. Wright, and Wilbur F. Stone, for the appellants.

Hugh Butler, A. B. McKinly, and T. D. W. Yonley, for the appellees.

By Court, HELM, J. The alternative writ of *mandamus* performs the office of the complaint in an ordinary civil action. It must state a cause of action, and failing to do so, will not support a judgment. Its legal sufficiency may, by the return or answer provided for in the Civil Code, be challenged as upon demurrer, and tested under the rules of pleading applicable to the ordinary complaint when assailed by demurrer.

The alternative writ before us is somewhat informal, and undoubtedly contains unnecessary matter; but so far as mere form is concerned, we shall hold it sufficient without discussion, and proceed to consider the alleged substantial legal objections that are fairly presented by respondent's demurrer.

The subject of water rights has always been justly regarded as one of the most important dealt with in the legislation and jurisprudence of Colorado. Hitherto attention has been mainly directed to the adjustment of priorities and differences between individual consumers; but hereafter, owing to the rapid settlement of the eastern part of the state, the *status* of the carrier and its relations with the consumer will command the most earnest and thoughtful consideration.

For convenience, I shall, throughout this opinion, use the terms "carrier" and "consumer," meaning the canal company and the tiller of the soil respectively.

The agriculturists in the territory mentioned are, with few exceptions, unable to convey water from the natural streams to their land. The annual rainfall is increasing; yet at present, without irrigation, but a small fraction of the producing capacity of the soil can be utilized, and, unaided, these consumers will for years to come be practically helpless. To the successful cultivation of that region, the carrier and consumer are therefore equally indispensable. Hence a wise legislative policy, and an intelligent judicial construction, require a careful consideration of the privileges, powers, and duties of the carrier, as well as the rights and obligations of the consumer. The courts should protect the consumer in the full enjoyment

of his constitutional and statutory rights; but they should also jealously guard the rights of the carrier; and so deal with it (the constitution and statutes permitting) as to encourage the investment of capital in the construction of reservoirs and canals for the storage and transportation of water.

The pleadings in the case at bar show that respondent is a carrier and distributer of water for irrigation and other purposes; that its canal, two years ago, was upwards of sixty miles in length, and capable of supplying water to irrigate a large area of land; that relator is one of the land-owners and consumers under the canal, and can obtain water from no other source; also that respondent has, undisposed, a sufficient quantity to supply his wants; that he tendered the sum of one dollar and a half per acre, the annual rental fixed by respondent, and demanded the use of water for the current season, but declined to pay the further sum of ten dollars per acre also demanded, and to sign a certain contract presented to him for execution; that respondent refused and still refuses to grant relator's request, except upon compliance with these conditions. The remaining essential facts will sufficiently appear in connection with the specific questions of law presented, as they are in their proper order discussed.

Does the record show a clear legal right of relator, from the enjoyment of which he is unlawfully precluded by respondent?

Our constitution dedicates all unappropriated water in the natural streams of the state "to the use of the people," the ownership thereof being vested in "the public." The same instrument guarantees in the strongest terms the right of diversion and appropriation for beneficial uses. With certain qualifications, it recognizes and protects a prior right of user, acquired through priority of appropriation. We shall presently see that after appropriation the title to this water, save, perhaps, as to the limited quantity that may be actually flowing in the consumer's ditch or lateral, remains in the general public, while the paramount right to its use, unless forfeited, continues in the appropriator. But to constitute a legal appropriation, the water diverted must be applied within a reasonable time to some beneficial use; that is to say, the diversion ripens into a valid appropriation only when the water is utilized by the consumer; though the priority of such appropriation may date, proper diligence having been used, from the commencement of the canal or ditch.

The constitution unquestionably contemplates and sanctions

the business of transporting water for hire from natural streams to distant consumers. The Colorado doctrines of ownership and appropriation (as declared in the constititution, statutes, and decisions) necessarily give the carrier of water an exceptional *status*,—a *status* differing in some particulars from that of the ordinary common carrier. Certain peculiar rights are acquired in connection with the water diverted. It is unnecessary now, however, to enumerate these rights in detail. For the present, it suffices to say that they are dependent for their birth and continued existence upon the use made by the consumer.

But giving these rights all due significance, I cannot consent to the proposition that the carrier becomes a "proprietor" of the water diverted.

A cursory reading of the statutes might convey the impression that the legislature regarded the carrier as possessing a salable interest in this water. And the constitutional phrase, "to be charged for the use of water," relating to the carrier's compensation, might at first glance seem to recognize a like ownership in such use. But construing all the provisions of that instrument bearing upon the subject *in pari materia*, the correctness of both of these inferences must be denied. The constitutional convention was legislating with reference to the necessities and practical wants of the people. And this body in its wisdom ordained that the ownership of water should remain in the public, with a perpetual right to its use free of charge in the people.

By section 8, article 16, of the constitution, from which the foregoing phrase is taken, the convention recognized the carrier's right to compensation for transporting water, and provided for a judicial, or *quasi* judicial, tribunal to fix an equitable maximum charge where the parties fail to agree. It requires no citation of authority to show that the words "purchase" and "sale," together with other words of like import, used in this connection by the legislature, must receive a corresponding interpretation. Under the constitution, as I understand it, the carrier is at least a *quasi* public servant or agent. It is not the attitude of a private individual contracting for the sale or use of his private property. It exists largely for the benefit of others, being engaged in the business of transporting, for hire, water owned by the public to the people owning the right to its use. It is permitted to acquire certain rights as against those subsequently diverting water from the same natural

stream. It may exercise the power of eminent domain. Its business is affirmatively sanctioned, and its profits or emoluments are fairly guaranteed. But in consideration of this express recognition, together with the privileges and protection thus given, it is, for the public good, charged with certain duties and subjected to a reasonable control.

Were the constitution and statutes absolutely silent as to the amount of the charge for transportation, and the time and manner of its collection, there would be strong legal ground for the position that the demand in these respects must be reasonable. The carrier voluntarily engages in the enterprise; it has, in most instances, from the nature of things, a monopoly of the business along the line of its canal; its vocation, together with the use of its property, are closely allied to the public interest; its conduct in connection therewith materially affects the community at large; it is, I think, charged with what the decisions term a public duty or trust. In the absence of legislation on the subject, it would, for these reasons, be held, at common law, to have submitted itself to a reasonable judicial control, invoked and exercised for the common good, in the matter of regulations and charges. And an attempt to use its monopoly for the purpose of coercing compliance with unreasonable and exorbitant demands would lay the foundation for judicial interference: *Munn* v. *People*, 94 U. S. 113, and cases cited; *Price* v. *Riverside L. L. C.*, 56 Cal. 431; *Chicago etc. R. R. Co.* v. *People*, 56 Ill. 365; *Vincent* v. *Chicago etc. R. R. Co.*, 49 Id. 33.

But the constitution is not silent in the particular mentioned. It evinces, beyond question, a purpose to subject this, as other branches of the business, to a certain degree of public control. As we have seen, it provides for a tribunal to which the maximum amount of water rates may be referred, in case of dispute between the carrier and consumer. And I think that, by fair implication, it forbids the carrier's enforcement of unreasonable and oppressive demands in relation to the time and manner of collecting these rates. Any other view would accuse the convention of but partially doing its work. For the fixing of maximum rates would be protection grossly inadequate if either of the parties might dictate, absolutely, the time and conditions of payment. The primary objects were to encourage and protect the beneficial use of water; and while recognizing the carrier's right to reasonable compensation for its carriage, collectible in a reasonable manner, the constitu-

tion also unequivocally asserts the consumer's right to its use, upon payment of such compensation.

Any unreasonable regulations or demands that operate to withhold or prevent the exercise of this constitutional right by the consumer must be held illegal, even though there be no express legislative declaration on the subject.

The contract which respondent required relator to sign and agree to comply with, as a condition precedent to the granting of his request, contains the following, among other conditions: That he buy in advance "the right to receive and use water" from its canal, paying therefor the sum of ten dollars per acre; also that he further pay "annually, in advance, on or before the first day in May of each year, such reasonable rental per annum, not less than one dollar and a half nor more than four dollars per acre, as may be established from year to year" by respondent. If we hold respondent to the literal term used in this contract, we must declare the ten-dollar exaction illegal. Respondent cannot collect of relator the sum of ten dollars, or any other sum, for the privilege of exercising his constitutional right to use water.

But counsel contend in argument that the foregoing expressions, quoted from respondent's contract, are not intended to require the payment of ten dollars per acre for a right to use water. They say this ten dollars is merely a portion of the annual "rental" exacted of consumers in advance for the remaining years of respondent's corporate existence; that instead of requiring, say, two dollars and a half per acre, for each irrigating season in turn, respondent has seen fit to divide this sum into two parts, collecting one dollar and a half annually, and the residue of one dollar each for the remaining ten years of its corporate life, as one entire sum in advance.

This construction of the contract may, under all the circumstances, seem plausible, though I doubt if the courts could accept it; but if accepted, the difficulty under which respondent labors would not be obviated.

If the carrier may collect a part of its annual transportation charge in advance for the remaining years of its corporate life, it may collect all. Suppose the company just organized; under counsel's view, the consumer may, there being no legislation on the subject, be compelled to pay the cost of delivering water to him for the entire twenty years of its existence, before he can exercise his constitutional right during a single season

But there is nothing in the law obliging him to cultivate his land for any particular period. He may not want the water for twenty years, or it may be utterly impossible for him to advance so large a sum at once. In fact, the majority of those who till the soil are too poor to comply with such a demand; to say that they must do so, or have no water, is to deprive them of their right to its use just as effectually as though the right itself had no existence. It is true these people would not themselves be able to bring water from the natural streams to their farms, and without the carrier they might be compelled to abandon their attempts at agriculture. This consideration, however, only reinforces the position that a reasonable control was intended. The carrier must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional right, as well as a private enterprise prosecuted for the benefit of its owners. Yet, if such exactions as the one we are now considering are legal, the carrier might, at its option, in the absence of legislation, effectuate or defeat the exercise of this right; and we would have a constitutional provision conferring an affirmative right, subject for its efficacy in a given section to the greed or caprice of a single individual or corporation.

Besides the extraordinary power mentioned, the carrier would also, under counsel's view, be able to consummate a most unreasonable and unjust discrimination. B could have water because he can pay for its carriage twenty years in advance; C could not have water because he is unable to pay in advance for its carriage beyond a season or two.

But, say counsel, C's only remedy, and the only remedy of relator and other consumers dissatisfied with the carrier's terms, is by application to the county commissioners. I reply: 1. That, so far as the present case is concerned, this suggestion embodies but little consolation. Relator's land is situate in Arapahoe County. The statute, as it stood when the proceedings described in the alternative writ took place, did not permit the commissioners of that county to act with reference to respondent's canal; while, under the constitution, the commissioners of no other county could exercise the necessary jurisdiction.

It was utterly impossible, therefore, for relator to secure relief in the manner pointed out; and if the courts could not take cognizance of the alleged grievance, he was wholly bereft of means of redress. I reply: 2. That the commissioners may be empowered to fix the maximum amount of the

rate; that is, they may be authorized to announce a limit beyond which the carrier cannot go. In my judgment, under the constitution they cannot be vested with authority to establish the exact rate to be charged, or to specify either the time or conditions of payment. The time and conditions of payment are proper subjects for legislation. The legislature doubtless, has authority to say that the rate, whether the carrier adopt the maximum fixed by the commissioners or establish one below such limit, shall be collected annually in advance for each irrigating season; or it can make any other reasonable regulations in these respects. But the legislature itself cannot establish the unreasonable rule we have been considering, which enables the carrier to accomplish a wholesale discrimination between consumers, and deny, if it chooses, to a majority of them the rights secured them by the constitution. A regulation or rule entailing such results, whether established by the legislature or carrier, must be regarded as within a constitutional inhibition. This conclusion is not based merely upon the ground of private inconvenience or hardship; it rests, as will be observed, upon the higher and stronger ground of conflict with the beneficent purpose of our fundamental law.

A further consideration, worthy of mention in passing, bearing at least upon the unreasonableness of the view urged upon us, is the position of the consumer who pays the charges for twenty years in advance. What assurance has he that the carrier can or will keep his engagement during that period? Its business is attended with considerable hazard, and requires large and continuing expenditures of money. The consumer may find himself without water, and dependent, for the recovery of his large advancement, upon the doubtful experiment of suit against an insolvent company.

To say that the courts may not interfere under the circumstances above narrated is to say that the clear intent of the constitution in relation to a constitutional right may be disregarded with impunity, simply because no express inhibitory constitutional or statutory provision on the subject can be found; also, that, for a like reason, one charged with an important duty may condition its performance upon unreasonable and oppressive demands.

I do not usurp the province of the legislature by declaring what would be reasonable requirements as to the time and manner of collecting water rates. My position is, that,

for the reasons given, respondent's demand of ten dollars per acre, as an advance payment of part of the transportation charge for the remaining years of its corporate life, is illegal as well as unreasonable and oppressive.

Respondent's enterprise is of great public importance and benefit. The original construction of its canal cost large sums of money, and its running expenses are necessarily heavy. For a considerable period the capital invested must have been unproductive. These and other circumstances may be proper subjects for consideration by the commissioners when called upon to establish a maximum rate. And whenever they become appropriate matters for judicial cognizance, the attention deserved will be received from the courts. But no expenditure, however vast, and no inconvenience, however great, can justify or legalize the exaction, the consumer objecting, of the demand under consideration, as an absolute condition precedent to use for the current irrigating season.

I must not be understood as intimating that this demand is illegal *per se*. And if the consumer, prior to 1887, saw fit to waive his right by voluntarily submitting thereto, both the legislature and courts may be alike powerless to relieve him from the legitimate results of his contract.

When properly understood, the statutes, in so far as they relate to the principal subjects examined, harmonize with the conclusions above stated. Counsel's proposition that only those consumers who have previously used water are permitted to demand it on payment of the rate established by the carrier, is not sound. The section upon which they rely (Gen. Stats., sec. 1740) is simply an assurance of the right to continue under specified circumstances a use already exercised.

It does not operate to repeal section 311 of the General Statutes; this section expressly commands ditch companies having water in their canals not taken to furnish the same to the class of persons using it, in the manner named by the articles of incorporation, upon payment of the established rate; the declaration therein that this rate shall be fixed by the county commissioners must be taken with the constitutional condition attached, viz.: "Where application is made to them by either party interested." But when the company has a fixed rate of its own, with which the consumer is satisfied, no necessity exists for the making of such application. If counsel's position were correct, the land-owner who has never had the use of water would, so far as the statutes are concerned, be

wholly at the mercy of the carrier. For section 1740 does not give him the right to water, even when the maximum rate has been fixed by the commissioners.

In view of the foregoing conclusions, I need not dwell upon the legality of respondent's demand that relator, as a condition precedent to the use of water for the season of 1886, enter into the written contract before us. This contract contains a number of conditions that appear unreasonable, and, as I construe the constitution and statutes, are of doubtful legality. But it is sufficient to recall the fact that the unlawful demand of ten dollars per acre for the right to use water is a conspicuous provision therein. Relator could no more be required to execute a contract containing this condition than he could be compelled to comply with the demand in the absence of contract.

It is not necessary to consider what would have been the result had respondent charged $11.50 per acre for the irrigating season of 1886, instead of demanding $1.50 for that season, and $10 per acre as part payment for future years. Neither is it necessary to speculate as to what respondent would have charged for the season mentioned had the law been understood by its officers according to the construction above given. In view of the pleadings, and especially of the language employed in respondent's contract, I think that relator, upon the showing made, was entitled to the use of water from respondent's canal for the irrigating season specified in the alternative writ. This conclusion is emphasized by the defective condition of the commissioner statute prior to 1887, which left relator helpless so far as action by that body was concerned. I also think that *mandamus* lay for the enforcement of his rights in the premises.

The demurrer should have been overruled, and the judgment must therefore be reversed, appellant recovering his costs.

But courts do not order the performance of impossible acts. This proceeding was instituted for the purpose of compelling respondent to supply relator with water during the irrigating season of 1886. Since then respondent may have changed its annual charge or rate; besides, the only tender or demand appearing in the record were for that season. To order compliance with relator's request for 1886 would be absurd; to order a delivery of the water for 1888 would be unwarranted. To permit an amendment of the alternative writ, so as to cover

the approaching irrigating season, would be to allow the substitution in this proceeding of a new and wholly different cause of action; and to violate an established rule of pleading.

The judgment is reversed, and the cause remanded.

BECK, C. J. I concur in the foregoing opinion of Mr. Justice Helm as to most of the propositions therein contained. In my judgment, the district court had jurisdiction of this cause when it was before it, not upon the principal ground urged by the counsel for appellant, that there was no disagreement beween the parties as to the price or compensation demanded by respondent for furnishing the water requested, but on the ground that the terms and demands exacted were unreasonable and illegal.

The record before us does not warrant the proposition of counsel, that of the two sums of money demanded by the respondent, only the one dollar and a half per acre was for compensation for transporting and furnishing the water, and that the ten dollars per acre was wholly for royalty, gift, or bonus. Possibly a large portion of the latter sum may have been a demand of this character, and consequently without consideration in law or fact.

The alternative writ states, but not wholly *in hæc verba*, the stipulations upon this point of the contracts required to be signed by the consumers of water. The statement is: "Said contracts, after reciting that, in consideration of the stipulations therein contained and the payments as therein specified, the said company, party of the first part, agrees to sell to the consumer of water, the party of the second part, 'the right to receive and use water from the canal of the first party,' for irrigating the land described, for the sum of money named, and also 'upon the further payment annually in advance, on or before the first day of May in each year, from the date hereof, such a reasonable rental per annum, not less than one dollar and a half per acre, and not more than four dollars per acre, as may be established from year to year by the first party.'"

Appellant's counsel, in discussing the question of jurisdiction, construe the phrase above quoted from the contract, "the right to receive and use water from the canal of the first party," as an attempt on the part of the respondent company to sell a right which is by the constitution dedicated to the people and vested in the public, and which is, therefore, not a subject

of sale. The language may admit of criticism, but it is only slightly variant from the language employed in the constitution respecting the duty of the general assembly to provide by law that the board of county commissioners, in their respective counties, shall have power "to establish reasonable maximum rates to be charged for the use of water" furnished by individuals or corporations. And it is not as objectionable as the phraseology of the statutes, which includes such expressions as "selling water," "furnishing water for sale," "purchasing water," and the like.

Without any greater liberality of construction than that given the statutes, this contract might be construed to mean, by "the payments as therein specified" for "the right to receive and use water from the canal of the first party," the consideration charged by the respondent company for conveying water through its canal and furnishing it for the use of consumers. Now, the appellant was unwilling to make all the payments therein specified. He tendered a portion thereof, and refused to pay the balance. Did not this action on his part fairly give rise to a disagreement or dispute between the parties as to the price to be charged for waters from the ditch? It is my opinion that the nature of the disagreement came clearly within the purview of both the constitution and the statute.

But for the defect, therefore, in the statute (which deprived the appellant of any relief under it), it would have been obligatory upon him, before applying to the district court for relief against the unjust charges and terms imposed by the ditch company, to have made application to the county commissioners of Arapahoe County to establish the maximum rate which the respondent might charge. Therefore he might or might not have had a cause of action against the company, depending upon the course subsequently pursued by it. There being no gross wrong without a remedy, however, and the statute then in force affording the appellant no right to apply to said county commissioners to fix a rate, he was justified in applying to the court for relief in the first instance. Respecting the measure of relief which might have been granted, the writ being now *functus officio* as to its principal object, I express no opinion.

The respondent, however, could not legally require payment of the ten dollars per acre, or other sum, for a series of years in advance, whether it be regarded as compensation or other-

wise. Any sum charged for royalty, or as a bonus, would be unconstitutional.

Except in so far as these views may not harmonize with the foregoing opinion, I concur therein.

PETITION FOR MANDAMUS CANNOT BE DEMURRED TO; but if the writ is defective in form or substance, motion may be made to quash it, or the defect reached by return: *Dane* v. *Derby*, 89 Am. Dec. 722; *State* v. *Board of Equalization*, 74 Id. 381.

WHAT ALTERNATIVE WRIT OF MANDAMUS MUST CONTAIN: Note to *Dane* v. *Derby*, 89 Am. Dec. 741, 742.

APPROPRIATION OF WATER, and rights acquired by prior appropriation: *Ophir S. M. Co.* v. *Carpenter*, 97 Am. Dec. 550, note 559; *Davis* v. *Gale*, 91 Id. 554; *Lobdell* v. *Simpson*, 90 Id. 537, note 541; note to *Tolle* v. *Correth*, 98 Id. 543.

RIGHT TO USE OF WATER: *Stein* v. *Burden*, 65 Am. Dec. 394; note to *Tolle* v. *Correth*, 98 Id. 543.

CASES

IN THE

SUPREME COURT OF JUDICATURE

OF

INDIANA.

CHICAGO AND ATLANTIC RAILWAY CO. *v.* SUMMERS.

[113 INDIANA, 10.]

PROCEEDING TO ENFORCE PAYMENT OF JUDGMENT FOR ANIMALS KILLED OR INJURED BY RAILROAD COMPANY, under section 4030, Indiana Revised Statutes of 1881, is an original proceeding to be instituted only in the circuit court of the proper county, the decision in which is a final judgment, from which an appeal will lie to the supreme court, without regard to the amount of the original judgment sought to be enforced.

COMPLAINT IS SUFFICIENT ON DEMURRER, although, it seems, a motion to make it more certain and specific would be granted, where, in a proceeding under section 4030, Indiana Revised Statutes of 1881, to enforce payment of a judgment for animals killed and injured by a railroad company, it alleges that the "judgment was upon a complaint for stock killed and injured by said railway company," without showing that the stock were killed by the "cars, locomotives, or other carriages" of the company as mentioned in the statute.

PLEADING REQUIRED TO BE FILED BY PLAINTIFF IN PROCEEDING TO ENFORCE PAYMENT OF JUDGMENT for animals killed or injured by a railroad company, under section 4030, Indiana Revised Statutes of 1881, although called in the statute a "motion," may be demurred to or answered as in other civil actions.

MODES OF PROCEDURE AND RULES OF PRACTICE, PRESCRIBED IN CIVIL ACTIONS, ARE ALL APPLICABLE in Indiana to special statutory proceedings for the enforcement of private rights, except where the statute authorizing and regulating such special proceeding has expressly or by fair implication prescribed a different course of procedure or rule of practice therein.

VOID JUDGMENT MAY BE ATTACKED in a collateral suit or proceeding.

MOTION TO STRIKE OUT ANSWER WILL NOT PERFORM OFFICE OF DEMURRER THERETO for want of sufficient facts, and should not be sustained if the facts pleaded therein are relevant or pertinent to the issue, although insufficient on demurrer.

JUDGMENT RENDERED BY JUSTICE IN FAVOR OF PARTY FOR WHOM HE IS ACTING AS ATTORNEY in the case, is absolutely void, and may be attacked and impeached whenever and however it is sought to be enforced.

MOTION under section 4030, Indiana Revised Statutes of 1881, to enforce a judgment recovered against the railway company, before a justice of the peace, for stock killed and injured by the company. The facts are stated in the opinion.

J. S. Slick and W. O. Johnson, for the appellant.

A. I. Gould and G. A. Murphy, for the appellee.

By Court, HOWK, J. Appellee, Summers, has moved the court in writing to dismiss the appeal in this cause for the following reasons, namely: 1. Because this court has no jurisdiction whatever of such appeal; 2. Because it is not an appeal from a final judgment, but from an order on a motion under section 4030, Revised Statutes 1881; 3. Because such appeal was taken from a judgment of the court below in an action which originated before a justice of the peace, wherein the amount in controversy did not exceed fifty dollars, exclusive of costs, as shown by the record.

It is manifest, we think, that the consideration and decision of appellee's motion to dismiss this appeal will require at our hands an examination of the entire record of this cause. In view of this fact, and as counsel for both parties, as well for appellee as for appellant, have fully argued the cause on its merits, we have concluded to consider and decide now all the questions presented by the appeal herein and by appellee's motion to dismiss such appeal. In argument, appellant's learned counsel rely upon the following errors, assigned upon the record, for the reversal of the judgment or order below, namely: 1. The overruling of appellant's demurrer to appellee's motion or complaint; 2. The sustaining of appellee's motion to strike out appellant's answer to his motion or complaint herein.

On the twenty-ninth day of September, 1886, appellee, Summers, filed in the court below his complaint, wherein he averred that on the fifteenth day of July, 1885, he recovered before W. H. Weir, Esq., a justice of the peace of Starke County, a judgment against appellant herein, a corporation duly organized under the laws of this state, and operating a railroad through such county, for the sum of fifty dollars, and for fifteen dollars and forty cents costs, which judgment was upon a complaint for stock killed and injured by said railway company; and that such judgment was wholly unpaid, unappealed

from, and in full force. Appellee further alleged that on the twenty-eighth day of September, 1886, he caused a certified transcript of his said judgment to be filed in the clerk's office and recorded in the order-book of such court; and that William Scott, appellant's freight and ticket agent at North Judson, had, or would have in a short time, moneys in his hands belonging to appellant sufficient to pay off such judgment and costs. Wherefore appellee asked that a writ be issued requiring said Scott, agent as aforesaid, to appear before such court and answer, upon oath, as to such money, and for all other proper relief.

It is conceded by counsel on both sides that this proceeding or suit was instituted by appellee in the court below under the provisions of section 4030, *supra*, in force since March 4, 1863. In that section it is provided as follows: "Any person obtaining a judgment before a justice of the peace for any animal or animals killed or injured by the cars, locomotives, or other carriages of any railroad in this state, upon the filing of a certified transcript of such judgment in the office of the clerk of the circuit court of the county in which such animal or animals were killed or injured, and upon the clerk of such court entering the same on the order-book thereof, upon notice and motion made in such court, as specified in the preceding section, shall be entitled to the order and proceedings as therein specified."

Two things are manifest, we think, from these statutory provisions, namely: 1. That the proceeding of the judgment plaintiff to enforce the payment of his judgment by notice and motion, as provided in the statute, is not an appeal, nor in the nature of an appeal, from the judgment of the justice, but is a new and original suit or proceeding to be instituted, under the statute, in the circuit court of the proper county, and in no other court or county; and 2. The decision of the proper court, upon the hearing of the suit or proceeding, is not interlocutory, but is a final order and judgment, from which an appeal will lie to this court without regard to the amount of the justice's judgment of which the court may require the payment. From this construction of the statute, which seems to us to be correct, it follows necessarily that appellee's motion to dismiss the appeal herein, for any or all of the causes specified therein, is not well taken and cannot be sustained. The motion to dismiss, therefore, is overruled, with costs: *Louisville etc. R'y Co.* v. *Thompson*, 62 Ind. 87.

Appellant's counsel claim that the complaint or motion herein was bad on demurrer, because it failed to show that appellee obtained his judgment before the justice for any animal or animals killed or injured by appellant's "cars, locomotives, or other carriages." The averment of the motion or complaint on this point is, that the "judgment was upon a complaint for stock killed and injured by said railway company."

We are of opinion that the motion or complaint herein was sufficient to withstand appellant's demurrer thereto. The utmost that can be said, we think, against the sufficiency of the motion or complaint is, that the averment last quoted does not show with sufficient certainty that appellee's judgment before the justice was upon a complaint for stock killed and injured by the cars, locomotives, or other carriages of the appellant. This objection to the motion or complaint, however, if it exist, can only be reached or taken advantage of by a motion to make the pleading more certain and specific, and a demurrer thereto, on that ground, may be overruled without error: R. S. 1881, sec. 376; *Pittsburgh etc. R'y Co.* v. *Hixon*, 110 Ind. 225.

In appellant's answer to appellee's motion or complaint, the material facts alleged were, that the judgment, the payment of which is sought to be enforced in this proceeding, was rendered by and before a justice of the peace who was appellee's attorney in commencing the suit wherein such judgment was rendered; that he prepared appellee's complaint in that suit, and signed his name thereto as plaintiff's attorney, and filed the same before another justice of Starke County, and appeared before the latter justice as appellee's attorney to prosecute such suit; that the venue of such suit was changed from the latter justice, and he sent the same for trial to the justice of the peace who was appellee's attorney therein, and who took jurisdiction thereof, and rendered the judgment therein mentioned in the motion or complaint in this proceeding.

It was further averred in appellant's answer herein that while such suit was pending before appellee's attorney therein, as such justice of the peace, and on the day set for the trial of such cause, appellant herein appeared specially before such justice, and filed its verified plea in abatement to the jurisdiction of such justice to hear and determine such suit, for the reason following, namely: "That said justice drew up and signed the complaint herein as the attorney for the plaintiff, and was regularly employed by the plaintiff to act as his at-

torney herein, and has ever since been and is now acting as such attorney for plaintiff in this action, with his said partner, Murphy."

It was further averred in its answer herein that appellant then withdrew from such suit, and appeared no further therein; and that thereupon such justice of the peace, still acting as the attorney for the plaintiff, and not otherwise, entered of record upon his docket, as such justice, his judgment in such suit, the payment of which is sought to be enforced by appellee's motion in this suit or proceeding.

Appellee's written motion to strike out appellant's answer herein, the substance of which we have just given, was sustained by the court below, and to this ruling appellant excepted, and filed its bill of exceptions. This ruling is the second error upon which appellant's counsel rely for the reversal of the judgment below.

In his motion to strike out appellant's answer herein, appellee assigned the following causes therefor, namely: 1. Appellee's motion or complaint herein is one to which no answer will lie; 2. Such answer makes a collateral attack upon the judgment mentioned in such motion or complaint; 3. Appellant's answer is immaterial and irrelevant; and 4. Appellee's motion or complaint herein is an *ex parte* proceeding.

We are of opinion that the court below clearly erred in rejecting or striking out appellant's answer herein. As we have already said, appellee's motion or complaint herein was, under the statute, the institution of a new suit or proceeding by appellee and against the appellant. In other words, such suit or proceeding was the "one form of action for the enforcement of private rights," which, in our code, is "denominated a civil action": R. S. 1881, sec. 249; *Burkett* v. *Holman*, 104 Ind. 6.

Although the pleading first filed by the plaintiff in such a suit or proceeding as the one at bar is called in the statute a "motion," yet we do not doubt that the sufficiency of the facts stated therein to constitute a cause of action may be tested by demurrer, nor that answers and replies may be filed and issues formed thereon, either of law or fact, as in other civil actions.

It has often been held by this court, and correctly so, we think, that the modes of procedure and rules of practice prescribed by our Civil Code in civil actions are all applicable to a special statutory proceeding for the enforcement of private rights, except where the statute authorizing and regulating such special proceeding has expressly or by fair implication

prescribed a different course of procedure or rule of practice therein: *Crume* v. *Wilson*, 104 Ind. 583; *Bass* v. *Elliott*, 105 Id. 517; *Robinson* v. *Rippey*, 111 Id. 112, 118; *Hutchinson* v. *Trauerman*, 112 Id. 21.

It is assigned as a cause for striking out or rejecting appellant's answer herein, that it makes a collateral attack upon the judgment mentioned in appellee's motion or complaint.

It is settled by our decisions that a judgment cannot be attacked or impeached in a collateral suit or proceeding unless it be void: *Exchange Bank* v. *Ault*, 102 Ind. 322; *Baltimore etc. R. R. Co.* v. *North*, 103 Id. 486; *Walker* v. *Hill*, 111 Id. 223; *Ely* v. *Board etc.*, 112 Id. 361. The doctrine of the cases cited, however, has no application whatever to a case where, as here, the judgment is shown by the averments of the complaint or answer to have been void. It will not do to say, we think, that the averments of appellant's answer herein are immaterial and irrelevant, as alleged by appellee. While it is true that a motion to strike out a pleading is not the equivalent of a demurrer thereto, yet, where the motion has been sustained, it must be held, we think, that such motion, like a demurrer, admits the truth of all the facts well pleaded, for the purposes of the motion. Under our code it has often been held that a motion to strike out an answer will not perform the office of a demurrer thereto for the want of sufficient facts.

In the early case of *Port* v. *Williams*, 6 Ind. 219, in speaking of an answer which had been struck out on motion, the court said: "Whether it [the answer] was a sufficient defense to bar the action was wholly immaterial. It was, at least, such pertinent matter as the court ought not to strike out on motion. It was not so irrelevant as to warrant that; it was not a sham defense. We are therefore of opinion that the court erred in sustaining the motion to strike out." To the same effect are the following cases: *Clark* v. *Jeffersonville etc. R. R. Co.*, 44 Id. 248; *Indianapolis etc. Co.* v. *Caven*, 53 Id. 258; *City of Elkhart* v. *Simonton*, 71 Id. 7; *McCammack* v. *McCammack*, 86 Id. 387; *Burk* v. *Taylor*, 103 Id. 399.

In the case in hand it cannot be claimed that the facts stated in appellant's answer were not pertinent to appellee's motion or complaint, or were irrelevant, or were a sham defense to this action. Whether, therefore, appellant's answer was a good or bad defense to this suit or proceeding, it is certain that the court below erred in sustaining appellee's motion

to strike out or reject such answer, and that, for this error, the judgment below must be reversed.

This conclusion disposes of the questions actually presented for decision by this appeal; but it is proper, we think, and perhaps better, for the parties to this suit that we should consider and decide now the question of the sufficiency of appellant's answer herein to withstand a demurrer thereto for the want of sufficient facts. We are of opinion that the facts stated in such answer are amply sufficient to constitute a good defense in bar of appellee's suit or proceeding, and to show, if sustained by the evidence, that the justice's judgment, mentioned in the motion or complaint herein, was and is absolutely null and void. Such a judgment appellant had the right to attack and impeach whenever and however it was sought to be enforced. If, at the time his action against appellant was pending before the first justice, appellee in person had been a qualified and acting justice of the peace of Starke County, and if, when the change of venue was granted, the action had been sent to appellee as such justice, and he had tried and decided the case, and had rendered and entered judgment therein in his own favor and against appellant, no one could doubt that such judgment was wholly void and could not be enforced; for such a judgment would be in direct violation of the old and well-known legal maxim, namely, *Nemo debet esse judex in propria sua causa:* Broom's Legal Maxims, 116.

In legal effect, however, under the averments of appellant's answer herein, the justice's judgment, the payment of which is sought to be enforced in this suit or proceeding, was rendered by the judgment plaintiff, appellee herein, *in propria sua causa.* For it is averred in such answer that the justice of the peace to whom the action was sent on change of venue was "still acting as the attorney for the plaintiff, and not otherwise," at the time he rendered such judgment in the aforesaid action. If the fact so averred be true, the justice's judgment was unquestionably void.

The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the motion to strike out the answer, and for further proceedings not inconsistent with this opinion.

VALIDITY OF JUDGMENT RENDERED BY DISQUALIFIED JUDGE: See note to *Moses* v. *Julian*, 84 Am. Dec. 126. Acting as counsel in case disqualifies judge and renders judgment void: *Newcome* v. *Light*, 44 Am. Rep. 604.

VOID JUDGMENT MAY BE COLLATERALLY ATTACKED: See *Sidensparker* v. *Sidensparker*, 83 Am. Dec. 527, and note; *Hahn* v. *Kelly*, 94 Id. 742, and note 762–770.

MOTION TO STRIKE OUT ANSWER, WHEN ENTERTAINED: See the note to *People* v. *McCumber*, 72 Am. Dec. 521–526.

BROWN *v.* JONES.

[113 INDIANA, 46.]

ACCEPTOR OF BILL OF EXCHANGE HAS RIGHT TO QUALIFY HIS ACCEPTANCE by designating the place of payment; and when the place of payment is thus designated, it becomes part of the contract of acceptance.

SECTION 368, INDIANA REVISED STATUTES OF 1881, PROVIDING THAT IT SHALL NOT BE NECESSARY TO AVER OR PROVE DEMAND AT PLACE OF PAYMENT fixed by a bill, note, or other contract, has no application to a case where the demand of payment is necessary to create a cause of action against the drawer or indorser of a bill of exchange.

PRESENTMENT MUST BE MADE AT PLACE OF PAYMENT DESIGNATED by the acceptance of a bill of exchange, or a sufficient excuse for failing to so present it must be shown, or else the drawer and indorsers of the bill will be discharged.

IT WILL BE PRESUMED BY SUPREME COURT THAT BILL OF EXCHANGE WAS NOT PRESENTED AT PLACE DESIGNATED by the acceptance, where it is not stated in the finding that the bill was so presented.

ACTION by Jones and others against James F. Brown, the drawer and indorser of a bill of exchange. The opinion states the facts.

J. McCabe and E. F. McCabe, for the appellant.

I. E. Schoonover, W. B. Reed, J. E. McDonald, J. M. Butler, and A. L. Mason, for the appellees.

By Court, ELLIOTT, J. The material facts as they appear in the special finding, but stated in a condensed form, are these: On the eleventh day of February, 1884, the appellees were bankers, doing business at Attica, Indiana, under the name of the Citizens' Bank. On that day the appellant indorsed to them a bill of exchange drawn by him on F. W. Pullen & Co., Chicago, Illinois. The acceptance of the bill was in these words: "Accepted and payable at 1363 Kinzie Street." By a series of indorsements, the bill reached the First National Bank of Chicago for collection. On the fifteenth day of March, 1884, that bank placed the bill in the hands of Orville Peckham, a notary public, to be presented for payment. "The notary," as the finding states, "went with said bill to the office of the acceptors for the purpose of present-

ing it for payment, but found the office closed and locked, and was, after the exercise of reasonable diligence, unable to find any member of the firm of F. W. Pullen & Co., and that said bill was thereupon duly protested for non-payment." Notice of protest was addressed to James F. Brown, and on the evening of March 16th was mailed to the Citizens' Bank, at Attica. On the eighteenth day of that month the notice was received by the Citizens' Bank, and on the same day it was mailed to the appellant at his residence and post-office, together with a written request for payment.

The acceptors of the bill had the right to qualify their acceptance by designating the place of payment. The designation of the place of payment became part of the contract, and it is an element that exerts an important influence upon the case.

One of the positions assumed by the appellant is, that he cannot be held as an indorser or drawer because it does not appear that the bill was presented at the place fixed by the contract. It is the contention of his counsel that, while the finding shows that the bill was presented at the office of the acceptors, it does not appear that the office was the place designated in the acceptance.

In answer to the appellant's argument on this question, the appellee's counsel assume that the case is governed by our statute, and that it was not necessary to show that the bill was presented for payment. The statute to which they refer provides that: "In any action or defense founded upon a bill or note or other contract for the payment of money at a particular place, it shall not be necessary to aver or prove a demand at the place, but the opposite party may show a readiness to pay the demand at the proper place": R. S. 1881, sec. 368.

It is very clear that this statute has no application to a case where the demand of payment is necessary to create a cause of action, against the drawer or indorser of a bill of exchange, and so it has been many times decided.

The finding does not show in express terms that the bill was presented at 1363 Kinzie Street, nor does it show, as counsel assume, that diligence was used to find that place. It does state, in a very general way, that reasonable diligence was used to find the members of the firm of F. W. Pullen & Co., but it does not state that diligence was used to find the place described in the acceptance. If it were conceded that the general conclusion as to the exercise of diligence is sufficient,

it could not be assumed that this conclusion applied to any other acts than those involved in the effort to find one of the acceptors.

It is, however, contended by appellees' counsel that presentment at the office of the acceptors was sufficient. If this be so, then the finding on this point may be upheld.

We are, however, constrained to differ from counsel upon this proposition. Our opinion is, that where a place of payment is definitely fixed by the contract of acceptance, there the presentment must be made, or a sufficient excuse for failing to there make it be shown, or else the drawer or indorser of the bill is discharged. The cases referred to by counsel do not oppose this conclusion. These cases are *Shed* v. *Brett*, 1 Pick. 413; *Williams* v. *United States Bank*, 2 Pet. 96; *Ogden* v. *Cowley*, 2 Johns. 274; *Burbank* v. *Beach*, 15 Barb. 326; *Cayuga County Bank* v. *Hunt*, 2 Hill, 635; *Wiseman* v. *Chiappella*, 23 How. 368; and *Wallace* v. *Crilley*, 46 Wis. 577. In none of them was the place of payment fixed by the acceptance, and they cannot, therefore, be regarded as at all in point.

Our conclusion has a firm support from the authorities. Mr. Daniel, after showing that, to charge the acceptor, it is not necessary to present the bill for payment at the place specified, says: "In respect to the indorser of a bill or note, or the drawer of a bill, payable at a particular bank or other place, the rule is different. He is not the original debtor, but only a surety. His undertaking is not general, but conditional upon due diligence being used against the principal debtor; and such diligence requires presentment at the place specified, where it is to be presumed that funds have been provided to meet the bill at maturity": 1 Daniel on Negotiable Instruments, sec. 644. Another writer says: "When a bill or note is drawn, payable at a place named, it is essential to show, in an action against the drawer or indorser, a presentment at the place appointed": Edwards on Bills and Notes, sec. 679.

In *Cox* v. *National Bank*, 100 U. S. 704, the court said: "Cases arise where the drawer of a bill of exchange designates in the instrument the place of payment, and the decisions are, that in such a case both the drawer and the indorser will be discharged unless the bill be there presented for payment at maturity." It was held in *Marsh* v. *Low*, 55 Ind. 271, that the acceptor is the principal debtor, and so all the cases hold; holding also without exception, so far as our investigation has gone, that, to charge the drawer or indorser, presentment for

payment must be made at the place specified: *Hartwell* v. *Candler*, 5 Blackf. 215; *People's Bank* v. *Brooke*, 31 Md. 7; 1 Am. Rep. 1; *Smith* v. *McLean*, 7 Am. Dec. 693; *Glasgow* v. *Pratte*, 8 Mo. 336; 40 Am. Dec. 142; *Dupré* v. *Richard*, 11 Rob. (La.) 495; 43 Am. Dec. 214, and note 222.

The question here is one of evidence, and not of pleading. The plaintiffs have failed to establish an essential element of their cause of action. As it is not stated in the finding that the bill was presented at the place designated, and as the burden of proof on that question is on the appellees, we must presume that it was not in fact there presented: *Stix* v. *Sadler*, 109 Ind. 254; *Vinton* v. *Baldwin*, 95 Id. 433, and cases cited.

We think justice will be secured by awarding a new trial, and this is adjudged: *Parker* v. *Hubble*, 75 Ind. 580; *Yerkes* v. *Sabin*, 97 Id. 141, 144; *Shannon* v. *Hay*, 106 Id. 589; *Sohn* v. *Cambern*, 106 Id. 302; *Western Union Tel. Co.* v. *Brown*, 108 Id. 538; *Buchanan* v. *Milligan*, 108 Id. 433.

Judgment reversed, at costs of appellees, and cause remanded, with instructions to award a new trial.

PLACE OF PRESENTMENT OF BILL OF EXCHANGE: See *Galpin* v. *Hard*, 15 Am. Dec. 640, and note 643, 644; *Dupré* v. *Richard*, 43 Id. 214, and note 221, 222; note to *Berg* v. *Abbott*, 24 Am. Rep. 160, 161.

DOBBINS *v.* MCNAMARA.

[113 INDIANA, 54.]

ONE AGAINST WHOM JUDGMENT BY DEFAULT HAS BEEN TAKEN, WITHOUT SERVICE OF PROCESS, and over whose person the court had acquired no jurisdiction, is entitled to have the judgment set aside, whether he has a good defense to the action or not, and may maintain a direct action for that purpose.

DIRECT ACTION TO VACATE AND SET ASIDE JUDGMENT TAKEN BY DEFAULT, in a case where there had been no service of process upon the defendant therein, and no jurisdiction acquired by the court over his person, is not governed by the statutory requirements concerning complaints for review and applications to set aside defaults, but contemplates the formation of issues, and a hearing upon such evidence as may be mutually introduced.

ACTION to set aside a judgment taken by default. The opinion states the case.

N. L. Agnew, B. Borders, and J. F. Yarnell, for the appellant.

W. Spangler and H. A. Steis, for the appellee.

By Court, NIBLACK, J. The complaint in this proceeding represented that Matt Dobbins, the appellant, had, on the first day of December, 1884, in an action for an alleged breach of a marriage contract, recovered a judgment in the Pulaski circuit court against Hugh McNamara, the appellee, for the sum of three hundred dollars in damages, and costs of suit, setting out the complaint in that action at full length; that Dobbins, the plaintiff in the action thus referred to, had caused a summons to be issued against the defendant, McNamara, and by an indorsement on the complaint had made the summons returnable on the fifteenth day of the previous month of September, 1884; that the sheriff of Pulaski County, to whom the summons was directed, made return thereto as follows: "Came to hand this first day of September, 1884. I return this summons served by leaving a true copy of the original summons, by direction of the attorney for the plaintiff, at the residence of Edward Parish, supposed to be the last and usual place of residence of Hugh McNamara"; that upon this return a default was entered against him, the said McNamara, and a judgment rendered against him as above stated.

The complaint further represented that he, the said McNamara, had in fact no notice of the pendency of said action; that at the time the complaint was filed and the summons was issued he was not a resident of Pulaski County, but was then and for about a year previously had been a resident of Benton County, in this state; that he had never at any time made his home with Edward Parish, or even remained over night at his house or place of residence; that he was not at any time within the jurisdiction of the Pulaski circuit court during the pendency of said action, and never knew that any such action was pending against him, or that any judgment had been therein rendered against him, until the fourteenth day of December, 1885, more than a year after the judgment had been entered.

The complaint still further represented that the pretended service of, as well as the return to, the summons in said original action was procured to be made by the fraud of the attorney for the plaintiff, and without proper inquiry either by such attorney or the sheriff; that the proceedings in said

cause were erroneous, irregular, and void for want of jurisdiction over the person of him, the said McNamara, and because the complaint was insufficient to authorize the rendition of such a judgment, and because the return of the sheriff was too defective to justify the entry of a default against him in the action. Wherefore the said McNamara demanded that the judgment in question should be set aside, vacated, and held for naught.

The complaint was verified by the affidavit of McNamara duly attached.

A demurrer to the complaint being first interposed and overruled, the appellant, Dobbins, asked leave to file an answer to the complaint, which was refused. She then moved that the cause be set down for a hearing, and that she be allowed to introduce evidence to rebut the allegations of the complaint, and that motion was also denied. The court thereupon, considering only the allegations of the complaint, made a finding that the judgment described in that pleading was void and of no effect, and ought therefore to be vacated and set aside, and adjudged accordingly.

In support of the demurrer to the complaint, it is contended that the demurrer ought to have been sustained, because, considered as a complaint for a review of the proceedings complained of, it was insufficient on account of the failure to file with it a transcript of those proceedings, and because, considered as a complaint for relief against a surprise, under section 396 of the present code, it was deficient in not averring and showing a meritorious defense to the action from which relief was demanded.

Whatever the pleader may have intended in regard to the precise form of this proceeding, the complaint was, in its essential features, neither a complaint for a review of the proceedings in question, nor an application for relief under section 396 of the code, but was simply and only a petition, in the nature of a complaint, to have the judgment taken against McNamara annulled and set aside, upon the ground that the Pulaski circuit court had no jurisdiction over his person when it was rendered. Formerly, when a judgment was void for some reason apparent on the face of the proceedings, or was voidable on account of some matter *dehors* the record, an injunction was usually resorted to as a means of preventing its enforcement; but more recently an action to have such a judgment annulled and set aside has become a recognized

method of procedure. The distinction between such a proceeding and a complaint for a review was considered, and, to some extent, defined in the case of *Willman* v. *Willman*, 57 Ind. 500.

The difference between a direct proceeding to have a judgment annulled and vacated, and an application to have an ordinary default set aside under the provisions of section 396, was well stated argumentatively in the case of *Wiley* v. *Pratt*, 23 Ind. 628, and is one which ought to be carefully observed in the prosecution of an action like the one in hearing.

Where a default has been taken against a person upon whom there was no service of process, and over whose person the court had acquired no jurisdiction, he is entitled to have the judgment set aside, whether he has a good defense to the action or not. To illustrate: where a defendant, who is a resident of the state, is sued in a wrong county, and a judgment is taken against him without jurisdiction over his person, he has the right to have the judgment vacated and annulled, without disclosing any defense to the action, upon the principle that where a court has no jurisdiction to hear and determine the matters involved in a suit, it has nothing to do with the merits of the controversy. A judgment taken under such circumstances must yield to a direct attack, however meritorious the cause of action may have been. The complaint was therefore correctly held to be sufficient upon demurrer.

As having some reference to the questions hereinabove discussed, see Freeman on Judgments, secs. 116, 117; 3 Wait on Actions and Defenses, 733; 3 Pomeroy's Eq. Jur., sec. 1377; *Bush* v. *Bush*, 46 Ind. 70; *Cavanaugh* v. *Smith*, 84 Id. 380; *Harman* v. *Moore*, 112 Id. 221.

A proceeding of the class to which this belongs is in the nature of and analogous to an appeal to the equity jurisdiction of a court for the cancellation of an instrument in writing, and is not a summary proceeding in the sense in which an application for relief under section 396 has been held to be. In such a proceeding, the formation of issues, and a hearing upon such evidence as may be mutually introduced, as in ordinary cases of equitable jurisdiction, are contemplated. The court below consequently erred in refusing to permit the appellant to file an answer to the complaint, and in declining to set down the cause for a hearing in the manner contemplated as above.

In applications for relief under section 396, it is only as to the truth of the alleged facts relied on as a defense that a counter-affidavit, or countervailing evidence, is not admissible. As to the causes for which relief is sought, evidence may be, and usually ought to be, heard as in ordinary adversary proceedings: Freeman on Judgments, sec. 109; *Hill* v. *Crump*, 24 Ind. 291; *Buck* v. *Havens*, 40 Id. 221; *Lake* v. *Jones*, 49 Id. 297; *Nord* v. *Marty*, 56 Id. 531; *Douglass* v. *Keehn*, 78 Id. 199; *Lawler* v. *Couch*, 80 Id. 369; *Brumbaugh* v. *Stockman*, 83 Id. 583; *Clandy* v. *Caldwell*, 106 Id. 256.

The judgment is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

JUDGMENT BASED UPON FALSE RETURN OF PROCESS, CONCLUSIVENESS OF: See *Taylor* v. *Lewis*, 19 Am. Dec. 135, and note 137–139.

SETTING ASIDE DEFAULT FOR MISTAKE, SURPRISE, INADVERTENCE, OR EXCUSABLE NEGLECT: See the note to *Burnam* v. *Hays*, 58 Am. Dec. 392–398.

CONTINENTAL LIFE INSURANCE CO. *v.* YUNG.

[113 INDIANA, 159.]

VERDICT OUGHT NOT TO STAND, when there is clear and convincing proof of an essential fact, contrary to the finding of the jury, and no evidence fairly tending to sustain it.

SUPREME COURT IS NOT JUSTIFIED IN ORDERING NEW TRIAL, because the evidence which tends to support the finding of the jury may be contradicted.

SUPREME COURT CANNOT SAY THAT EVIDENCE IS CONCLUSIVELY CONTRADICTED, however much it may be opposed by other testimony, where competent evidence appears in the record which, if believed, necessarily tends to support the finding of the jury, unless it be of such a character that, to believe it, would necessarily involve an absurdity in reason, or an impossibility according to the very nature of things.

INSTRUCTION THAT IF CERTIFICATE OF DEATH OF INSURED, made by the attending physician and furnished the company, contained a statement that the insured died of Bright's disease, such statement might be considered as tending to show that he was afflicted with that ailment when he signed the application for insurance, is properly refused, in an action on the policy, issued shortly before the death of the insured, although the inference to be drawn from the statement is a proper subject of argument for the jury.

INSTRUCTION THAT IF INSURED HAD AT TIME OF MAKING APPLICATION SOME AFFECTION OR AILMENT of any organ inquired about in the application, of a character so well defined as to materially derange for a time the functions of the organ, such ailment, whether known to the insured

or not, would avoid the policy, and that this would be so of Bright's disease, if it was such a disease as that mentioned, is correct, in an action on the policy.

COURT MAY WITHDRAW FROM JURY HYPOTHETICAL QUESTION which, on account of its scientific nature, they report their inability to answer.

ACTION on a policy of life insurance. The facts are stated in the opinion.

F. M. Finch and J. A. Finch, for the appellant.

G. Carter and J. N. Binford, for the appellee.

By Court, MITCHELL, C. J. Nettie Yung sued the Continental Life Insurance Company to recover the amount alleged to be due her on a policy of life insurance, issued on the thirtieth day of June, 1883, on the life of Christian Yung, the plaintiff's husband.

The complaint alleges that the death of Christian Yung occurred on the fourth day of August, 1883, and that all of the conditions of the policy had been duly kept and performed on the part of the plaintiff and the assured.

The company defended upon the ground that there had been a breach of the warranties contained in the application and policy, in that, by his answers to certain questions propounded in the application, the assured had represented, among other things, that he then had no disease of the kidneys, or of the urinary or generative organs, when the truth was that, before and at the time of making the application, he was afflicted with a disease known as Bright's disease, which rendered insurance on his life more than ordinarily hazardous. There was a trial, and verdict for the plaintiff.

The only controverted question was, whether or not the insured was afflicted with Bright's disease at the time he made and signed his application for insurance. Upon this point the evidence was conflicting. The plaintiff below introduced evidence tending to show that the assured was at that time in robust health and free from disease or ailment, while the insurance company produced a medical witness, who testified that a short time prior to the making of the application he had subjected the urine of the assured to a chemical and microscopical examination, and in that manner had found out that he was afflicted with Bright's disease in a stage so far advanced as to be incurable. There was other evidence supporting the theory of the defense. The plaintiff, on the other hand, produced medical witnesses in rebuttal, who testified that all the

symptoms relied on to indicate the presence of Bright's disease, as testified to by the doctor who made the examination, might be produced by and result from other and merely temporary causes, such as a cold, affecting the organs involved, and the like. Apparently reliable testimony was also given to the effect that it was practically impossible to determine satisfactorily from one examination whether a patient had Bright's disease, or some other less aggravated malady of a similar but temporary character. Taking all the evidence together, it fairly became a question for the determination of the jury whether or not the defense was sustained. We agree that whenever it can be said that there is clear and convincing proof of an essential fact, contrary to the finding of the jury, and that the verdict is without any evidence fairly tending to sustain it, the verdict ought not to stand: *Stringer* v. *Northwestern M. L. Ins. Co.*, 82 Ind. 100; *Norwood* v. *Harness*, 98 Id. 134; 49 Am. Rep. 739, and cases cited. This cannot be said of the present case.

It is contended, however, that the evidence, if there is any, in support of the finding is clearly and conclusively contradicted, and that hence a new trial must be ordered.

That the evidence which tends to support the finding may be contradicted does not justify this court in ordering a new trial. Where competent evidence appears in the record, which, if believed, necessarily tends to support the finding, unless the evidence relied on is of such a character as that to believe it would necessarily involve an absurdity in reason, or an impossibility according to the very nature of things, this court cannot say, however much such evidence may be opposed by other testimony, that it is conclusively contradicted.

The impracticability of applying a rule such as that contended for was very clearly demonstrated in *Fort Wayne etc. R. R. Co.* v. *Husselman*, 65 Ind. 73.

In its sixth instruction, the defendant asked the court to charge the jury, in substance, that if the certificate of the death of the assured, made by the attending physician and furnished to the company by the plaintiff or her son, contained a statement to the effect that the assured died of Bright's disease, then such statement might be considered by the jury as tending to support the theory that the assured was afflicted with that ailment at the time he signed the application for insurance. The court declined so to charge, but, as pertinent to that subject, instructed the jury that if the certificate men-

tioned contained a statement of the disease of which the assured died, the jury might regard such statement as true. In our opinion, the company had no reason to complain of the refusal to give the charge requested. The inference to be drawn from the statement in the certificate of the attending physician, concerning the immediate cause of the death of the assured, was a proper subject for argument to the jury, but it was manifestly not a question of law for the court to instruct the jury upon and direct them as to what the certificate tended to prove, outside of the facts recited on its face: *Union Mutual L. Ins. Co.* v. *Buchanan*, 100 Ind. 63.

In its fifth instruction to the jury, the court charged to the effect that if the assured had, at the time of making his application, some affection or ailment of some one or more of the organs inquired about in the application, which ailment was of a character so well defined and marked as materially to derange for a time the functions of such organ, such ailment, whether known to the assured or not, would avoid the policy; to which was added "and this would be so with reference to Bright's disease of the kidneys, if it was such a disease as I have just mentioned."

So much of the charge as is quoted above is said to be fatally erroneous. In this we do not concur.

The instruction in its general scope is strictly in harmony with the law as announced in *Connecticut Mutual Life Ins. Co.* v. *Union Trust Co.*, 112 U. S. 250, and other well-considered cases, and in view of the evidence given, the concluding sentence was not objectionable: *Cushman* v. *United States Life Ins. Co.*, 70 N. Y. 72.

If, at the time the assured made his application for insurance, he had no functional disorder involving the organs about which inquiry was made, it is difficult to perceive how he could have been affected with Bright's disease of the kidneys, if, as the testimony tends to show, the presence of that disease is manifested by functional disorder. An ailment which produces no disorder, and of the presence of which the person affected is unconscious, can hardly be said to be a disease within the meaning of an insurance contract.

We are of opinion that the company has no just ground of complaint growing out of the giving or refusing of charges.

The fourth interrogatory submitted by the defendant below required the jury to answer a purely hypothetical question, relating to chemical and microscopical tests of the urine, and

the diseases indicated by such tests under certain supposed conditions. After the jury had retired, they notified the court of their inability to answer the above interrogatory. Thereupon the court, of its own motion, withdrew it from the jury, over the defendant's objection.

There was manifest impropriety in submitting the interrogatory in question to the jury in the first place. It could only have been answered by men skilled in the sciences to which it pertained and the application of those sciences to the discovery of disease, and when answered, the answer would have been merely evidentiary. It was within the discretion of the court to withdraw it from the jury upon being apprised of its nature, and that the jury were unable to answer it.

Concerning certain questions made upon rulings of the court in respect to the admission of evidence, it is only necessary to say we have considered the questions and find no error.

The judgment is affirmed, with costs.

NEW TRIAL BECAUSE VERDICT IS AGAINST EVIDENCE: See *Toledo R. R. Co. v. Harmon*, 95 Am. Dec. 489; *New Orleans R. R. Co. v. Statham*, 97 Id. 478; *St. Louis R. R. Co. v. Terhune*, 99 Id. 504, and the notes to these cases.

INVALIDITY OF LIFE INSURANCE POLICY OWING TO EXISTENCE OF DISEASE AFFECTING THE APPLICANT. — In construing policies of life insurance, the question has been frequently raised as to what ailment may be said to be a disease within the meaning of the insurance contract. It cannot, however, be supposed that one who, for the purpose of procuring insurance, alleges himself to be in "good health" shall be understood as warranting himself to be in perfect and absolute health, for this is seldom, if ever, the fortune of any human being: See *Willis v. Poole*, Park on Insurance, 555; *Peacock v. New York Life Ins. Co.*, 1 Bosw. 338; 20 N. Y. 293. In accordance with this doctrine, it is held that it would be most unreasonable to interpret the term "in sound health," as used in contracts for life insurance, to mean that the insured is absolutely free from all bodily infirmities or from all tendencies to disease: *Morrison v. Wisconsin etc. Life Ins. Co.*, 59 Wis. 162. The term "good health," or "sound health," as used in such contracts, is to be considered in its ordinary sense, — meaning that the applicant was free from any apparent sensible disease, or symptoms of disease, and that he was unconscious of any derangement of the functions by which health could be tested: *Conner v. Phœnix Ins. Co.*, 3 Dill. 224, 226; *Goucher v. N. W. Traveling Men's Ass'n*, 20 Fed. Rep. 596 (Wis.). So a warranty in an application for a policy that a third person is in "good health" is construed to mean, not an actual freedom from illness or disease, but simply that the person has indicated in his actions and appearance no symptoms or traces of disease, and to the ordinary observation of a friend or relative, is in truth well: *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274; 36 Am. Rep. 617; 28 Hun, 430. And numerous decisions sustain the general rule that a temporary ailment cannot be considered a disease unless it indicates a vice in the constitution, or is so serious as to

have some bearing upon the general health and continuance of life, or such as, according to common understanding, would be called a disease: *Cushman* v. *U. S. Life Ins. Co.*, 70 N. Y. 72, 77; *Higbie* v. *Guardian Mutual Life Ins. Co.*, 53 Id. 603; *Fitch* v. *American Popular Life Ins. Co.*, 59 Id. 557; *McGrath* v. *Metropolitan Life Ins. Co.*, 6 N. Y. St. Rep. 376; *Brown* v. *Metropolitan Life Ins. Co.*, Sup. Ct. Mich. 1887; *Fowkes* v. *M. & L. Life Ins. Co.*, 3 Fost. & F. 440. A representation that the applicant has had no serious illness will be construed to mean that he has never been so seriously ill as to permanently impair his constitution and render the risk unusually hazardous: *Illinois etc. Soc.* v. *Winthrop*, 85 Ill. 537. And it is stated as a general rule that answers of the applicant to inquiries as to the symptoms of disease are not to be regarded as absolutely material, unless such symptoms had once existed in such appreciable form as would affect soundness of health, or have a tendency to shorten life, and thus affect the risk: *Alabama Gold Life Ins. Co.* v. *Johnston*, 80 Ala. 467; and see *Holloman* v. *Life Ins. Co.*, 1 Wood, 674; *Price* v. *Phœnix Mutual Life Ins. Co.*, 17 Minn. 497; *Connecticut Mutual Life Ins. Co.* v. *Union Trust Co.*, 112 U. S. 250; *Cheever* v. *Union Central Life Ins. Co.*, 6 Cin. L. Bul. 196. The applicant is not bound to disclose all the trivial ailments or injuries of his life: *Home Mutual Life Ins. Co.* v. *Gillespie*, 110 Pa. St. 84; *Dreier* v. *Continental Ins. Co.*, 24 Fed. Rep. 670 (Ind.). Thus "a touch of dyspepsia coming on," which manifests itself only after long intervals, which yields readily to medical treatment, and which is not shown to have been organic and excessive, is not inconsistent with a representation that the person so affected is in sound health: *Morrison* v. *Wisconsin etc. Life Ins. Co.*, 59 Wis. 162. A representation that the applicant has not been "sick or afflicted with any disease" is not necessarily false because he has a "cold": *Metropolitan Life Ins. Co.* v. *McTeague*, 49 N. J. L. 587; 60 Am. Rep. 661; compare *Life Insurance Co.* v. *Francisco*, 17 Wall. 672, 680. So a negative answer to the question, "Has the party ever met with an accidental or serious personal injury?" was held not to bar a recovery, although the insured had actually met with an "accidental" injury, such injury being, however, slight, and not affecting the subsequent health or the longevity of the insured: *Wilkinson* v. *Connecticut Mutual Life Ins. Co.*, 30 Iowa, 119; 6 Am. Rep. 657; affirmed, 13 Wall. 222. It was, however, held that a tubercular affection of the lungs, or tubercles upon the lungs, or tubercles on the brain, or consumption, either of them constitute a local disease, as matter of law, within the meaning of the word "local" when used by a life insurance company to an applicant for insurance, by asking him if he has a local disease: *Scoles* v. *Universal Life Ins. Co.*, 42 Cal. 523.

And the general rule is, if the application for insurance on a person's life is expressly declared to be a part of the policy, and the statements therein are warranted to be true, such statements will be deemed material, whether they are so or not, the question of their materiality being removed from the consideration of the court or jury: *Co-operative Life Ass'n* v. *Lefiore*, 53 Miss. 1; *Dwight* v. *Germania L. Ins. Co.*, 103 N. Y. 341; *Continental L. Ins. Co.* v. *Rogers*, 119 Ill. 474; and if the statements of the applicant concerning his health are shown to be false, there can be no recovery on the policy, however innocently the statements may have been made, and notwithstanding their falsity may have no agency in causing the loss or producing the death of the insured: Id.; *Powers* v. *Northeastern Mut. L. Ass'n*, 50 Vt. 630; *Ætna Life Ins. Co.* v. *Paul*, 10 Ill. App. 431; *Foot* v. *Ætna Life Ins. Co.*, 4 Daly, 285; 61 N. Y. 571; *Baker* v. *Home Life Ins. Co.*, 2 Hun, 402; 64 N. Y. 648; *Cushman* v. *U. S. Life Ins. Co*, 63 Id. 404; *Wright* v. *Equitable Life*

Ass. Soc., 50 How. Pr. 467; *Conover* v. *Mass. Mut. L. Ins. Co.*, 3 Dill. 217; *Bancroft* v. *Home Benefit Ass'n*, 8 N. Y. St. Rep. 129; *Ritzler* v. *World Mut. L. Ins. Co.*, 10 Jones & S. 409; *Metrop. L. Ins. Co.* v. *McTeague*, 49 N. J. L. 587; 60 Am. Rep. 661; *Galbraith* v. *Arlington Mut. L. Ins. Co.*, 12 Bush, 29; *Ætna Life Ins. Co.* v. *France*, 91 U. S. 510; *Phœnix Mut. Life Ins. Co.* v. *Raddin*, 120 Id. 183; even where the answers of the applicant concerning her health were written by the agent of the company, and were made by him, knowing their falsity, without the knowledge of the insured, and he also signed her name to the application, it was held there could be no recovery on the policy: *McCoy* v. *Metrop. L. Ins. Co.*, 133 Mass. 82; the rule is, that knowledge on the part of the agent of a life insurance company of the falsity of a warranty will not relieve the assured from a forfeiture of the policy: Id.; *Berteau* v. *Phœnix Mut. L. Ins. Co.*, 67 N. Y. 595; 67 Barb. 354; 1 Hun, 430; 3 Thomp. & C. 576. But the statements in the application are to be interpreted with fairness to the assured. And it is stated to be a fair rule of interpretation, that the inquiries put to the applicant are deemed to relate to matters which affect the general health and the continuance of life, and not to temporary and occasional physical disturbances, the result of accidental causes, to which all persons are more or less subject. The latter are not supposed to be in the minds of the parties: Id.; *McGrath* v. *Metrop. L. Ins. Co.*, 6 N. Y. St. Rep. 376; *Higbie* v. *German Mut. L. Ins. Co.*, 53 N. Y. 603. On the other hand, if the party is interrogated in regard to a disease of well-marked symptons, alarming in character, which all well-informed persons regard as affecting the general health, and as threatening the continuance of life from the danger of its recurrence, he is bound to speak and to state the exact truth: Id., and the cases above cited. Compare *Schwarbach* v. *Ohio Valley Protective Union*, 25 W. Va. 622; *Knickerbocker L. Ins. Co.* v. *Trefz*, 104 U. S. 197; *Campbell* v. *New England Mut. L. Ins. Co.*, 98 Mass. 389. Where, however, an applicant for life insurance has answered all questions correctly and truly, he is not to be prejudiced by the fraud or mistake of the company's agent in writing out the application: *McCall* v. *Phœnix Mut. L. Ins. Co.*, 9 W. Va. 237; 27 Am. Rep. 558; and see *Commercial Ins. Co.* v. *Spankneble*, 52 Ill. 53; 4 Am. Rep. 582; if, without the applicant's knowledge, the agent inserts false answers in the application, the policy is not thereby invalidated: *Lueder* v. *Hartford etc. Ins. Co.*, 4 McCrary, 149. But compare *Ryan* v. *World Mut. L. Ins. Co.*, 41 Conn. 168; *Fletcher* v. *N. Y. Life Ins. Co.*, 4 McCrary, 440.

In the recent case of *Alabama Gold Life Ins. Co.* v. *Johnston*, 80 Ala. 467, the distinction between warranties and representations in a contract of insurance is pointed out, and it is held that the mere fact that a statement is referred to or even inserted in the policy itself is not now considered conclusive of its nature as a warranty; but whether it is to be construed as a warranty, or as a representation merely, depends rather on the form of the expression, the apparent purpose of its insertion, and its connection with other parts of the application and policy, construed together as one entire contract: See, as favoring this view, *Price* v. *Phœnix Mutual Life Ins. Co.*, 17 Minn. 497; 10 Am. Rep. 166; *Southern Life Ins. Co.* v. *Booker*, 9 Heisk. 606; 24 Am. Rep. 344; *Moulor* v. *American Life Ins. Co.*, 111 U. S. 335. Warranties will not be created nor extended by construction, but they must arise from the fair interpretation and clear intendment of the language used: *Miller* v. *Mutual Benefit Life Ins. Co.*, 31 Iowa, 216; *Wilkinson* v. *Connecticut Mutual Life Ins. Co.*, 30 Id. 119; 6 Am. Rep. 637. And where a policy of life insurance was conditioned to be avoided by "any untrue or fraudulent answer" to the questions

in the application, and the answers were not strictly true as to the birthplace, residence, and occupation of the insured, it was held that, none of these being material to the risk, they would be construed as representations, although expressly declared to be "the basis of the contract" of insurance: *Southern Life Ins. Co.* v. *Booker*, 9 Heisk. 603; 24 Am. Rep. 344; and see *Fitch* v. *American etc. Ins. Co.*, 59 N. Y. 557; 17 Am. Rep. 372.

Calling at a doctor's office for medicine to relieve a mere temporary indisposition, not serious in its nature, or calling at the home by a physician for the same purpose, is not to be regarded as an attendance by a physician, within the meaning of the question relating to such attendance in an application for life insurance: *Brown* v. *Metropolitan Life Ins. Co.*, Sup. Ct. Mich. 1887. So where the warranty was that the insured had not, during the last ten years, had any sickness or disease, and had not employed or consulted a physician for himself, it was held that a breach of warranty was not shown by proof that within a year previous to the application a physician had given the insured advice and medicine, it not appearing whether either were for the insured personally: *Mowry* v. *World Mutual Life Ins. Co.*, 7 Daly, 321. It has, however, been held that although a cold cannot be considered a "disease," yet a representation that the insured had not consulted or been prescribed for by a physician is falsified by proof of a consultation or prescription for a cold: *Metropolitan Life Ins. Co.* v. *McTeague*, 49 N. J. L. 587; 60 Am. Rep. 661.

Any change in the health of the insured, intermediate the application for life insurance and the issuing of the policy, should be communicated to the insurer: *Ormond* v. *Fidelity Life Ass'n*, 96 N. C. 158.

Waiver of Forfeiture. — Forfeitures are not favored in law, and it is well settled that forfeitures provided for in policies of insurance, being for the benefit of the party insuring, may be waived by such party: *Baker* v. *Union L. Ins. Co.*, 6 Robt. 393; *Bouton* v. *American Mut. L. Ins. Co.*, 25 Conn. 542. And the demand and receipt of assessments by a life insurance company, with knowledge that the contract was voidable on account of misrepresentations made by the insurer as to the state of his health, — *Masonic Mut. Benefit Ass'n* v. *Beck*, 77 Ind. 203; 40 Am. Rep. 295; *Excelsior Mut. Aid Ass'n* v. *Riddle*, 91 Ind. 84; *Schwarzbach* v. *Ohio Valley Protective Union*, 25 W. Va. 622; *Ball* v. *Granite State Mut. Aid Ass'n*, Sup. Ct. N. H., March, 1887; *Rice* v. *New England Mut. Aid Society*, Sup. Ct. Mass., March, 1888; or age: *Morrison* v. *Wisconsin etc. L. Ins. Co.*, 59 Wis. 162; *Gray* v. *National Ben. Ass'n*, 111 Ind. 531; or occupation: *Watson* v. *Centennial Mut. L. Ass'n*, 21 Fed. Rep. 698 (Mo.), — waives the forfeiture. The general rule well sustained by the authorities is, that if the assured has made misrepresentations to the insurance company, and the company, with knowledge thereof, continues to collect assessments, it thereby waives any right it may have to declare the policy obtained by such misrepresentations invalid: Id.; *Phœnix Life Ins. Co.* v. *Raddin*, 120 U. S. 183; *Stylow* v. *Wisconsin etc. Mut. L. Ins. Co.*, 69 Wis. 224; *Northwestern Mut. L. Ins. Co.* v. *Amerman*, 119 Ill. 329; compare *Swett* v. *Citizens' Mut. Relief Society*, 78 Me. 541; *Burbank* v. *Boston Police Relief Ass'n*, 144 Mass. 434.

OHIO AND MISSISSIPPI RAILWAY CO. *v.* WALKER.

[113 INDIANA, 196.]

ONE WHO WALKS UPON RAILROAD TRACK LAID ALONG PUBLIC STREET IS NOT TRESPASSER, especially if he be at a public crossing, and may recover for an injury caused by the negligence of the railroad company, if himself without fault.

GENERAL AVERMENT THAT PLAINTIFF WAS WITHOUT FAULT IS SUFFICIENT, in an action for a negligent injury, unless the facts specially pleaded clearly show that he was guilty of contributory negligence.

NEGLIGENCE MAY BE CHARGED IN GENERAL TERMS; and if the defendant desires a more definite statement of the facts, his remedy is by motion to make the complaint more specific, and not by demurrer.

OBJECTIONS TO EVIDENCE, TO BE OF ANY AVAIL, MUST BE REASONABLY SPECIFIC. It is not enough to state that the evidence is incompetent, immaterial, or irrelevant; but the particular objection must be fairly stated.

RIGHTS OF TRAVELER AND OF RAILROAD COMPANY UPON HIGHWAY CROSSING ARE EQUAL, in a sense; but the right of the company is superior in respect to the priority of passage.

RAILROAD COMPANY IS NOT BOUND TO BRING TRAIN TO STOP, OR TO SLACKEN ITS SPEED, when a person is seen crossing, or about to cross, the track at its intersection with a highway, but may presume that such person will take all proper precautions to avoid injury.

ACTION to recover damages for personal injuries sustained by the plaintiff by the alleged negligence of the defendant. The opinion states the case.

J. B. Brown, A. G. Smith, C. A. Beecher, and P. Werner, for the appellant.

J. G. Berkshire and T. C. Batchelor, for the appellee.

By Court, ELLIOTT, J. The first paragraph of the appellee's complaint alleges that the track of the appellant crosses Madison Street, in the city of North Vernon, at a point where it intersects Main Street, and runs along Main Street from that point for a distance of three hundred yards; that a hotel, called the Feadler House, stands on the southeast corner of the two streets; that on the eighth day of January, 1885, the appellee started to walk from the Feadler House northwest across Main Street, along and in Madison Street; that at the time he started across the street a locomotive and train of cars belonging to the appellant were upon the railroad track some distance to the northeast; that if moving at all, the locomotive and train were moving very slowly; that the employees of the appellant in charge of the train suddenly, and without ringing the bell or sounding the whistle, and without giving any

warning whatever, put the locomotive and train in rapid motion, and before the appellee could get across or away from the track, they ran the locomotive upon him; that had the whistle been sounded or the bell rung, appellee could have crossed the track in perfect safety.

The second paragraph differs from the first in this: it avers that the engineer had negligently left the locomotive in charge of the fireman.

The third differs from the other two in this: it avers that the train was standing still when Walker attempted to cross. All of the paragraphs contain the general allegation that the plaintiff was without fault.

Walker was not a wrong-doer in going upon the track laid along Main Street. He was on a public crossing, and in a public highway; for even had he not been on the Madison Street crossing, he would still have been on a public street, as Main Street, although used by the railway company, was still a street open to the use of the citizens, so far as that use did not interfere with the right of the railway company to operate its trains.

In the case of *Louisville etc. R'y Co.* v. *Phillips*, 112 Ind. 59, 2 Am. St. Rep. 155, we examined this question, and after reviewing many authorities, reached the conclusion that a person who walks upon a railroad track laid along a street is not a trespasser. Here the case is still stronger, because the plaintiff was on a public crossing as well as on a public street. It is, therefore, very clear that the decision in *Ivens* v. *Cincinnati etc. R'y Co.*, 103 Ind. 27, has no application; for in that case the plaintiff was a trespasser, because he was on the company's track, and not on a street or on a highway crossing.

We have no doubt that the appellant's counsel are right in asserting that if the complaint does not show that the plaintiff was not guilty of contributory negligence, it is bad: *Cincinnati etc. R. R. Co.* v. *Butler*, 103 Ind. 31; *Louisville etc. R'y Co.* v. *Phillips*, *supra*; *Palmer* v. *Chicago etc. R. R. Co.*, 112 Id. 250.

We have again and again affirmed that the complaint must affirmatively show that the defendant was negligent, and that the plaintiff was not. But while we agree with counsel that the plaintiff must show these facts, we cannot assent to their assertion that the complaint does not show that the plaintiff was free from fault.

The complaint avers, in direct terms, that the appellee was without fault, and this averment makes the pleading good. It has long been the rule in this court that the general averment that the plaintiff was without fault is sufficient, unless the facts specially pleaded clearly show that he was guilty of contributory negligence: *City of Fort Wayne* v. *De Witt*, 47 Ind. 391; *Town of Salem* v. *Goller*, 76 Id. 291; *Rogers* v. *Overton*, 87 Id. 410; *City of Washington* v. *Small*, 86 Id. 462; *Town of Rushville* v. *Poe*, 85 Id. 83; *Murphy* v. *City of Indianapolis*, 83 Id. 76; *Pittsburgh etc. R'y Co.* v. *Wright*, 80 Id. 182; *Board etc.* v. *Legg*, 93 Id. 523.

The rule that the general averment is sufficient has been so long established and so often approved that we should feel bound to adhere to it even if we doubted its soundness; but we think its soundness can be vindicated on principle. It is in the nature of a negative fact; and an averment of such a fact cannot be made with the same particularity as an affirmative one. The elementary books, recognizing this, agree that in such cases a general averment is ordinarily sufficient. It is evident that any other rule would be practically incapable of enforcement; for a negative fact can seldom be alleged except generally and by way of denial, since any other course would require a process of exclusion and elimination that would lead to an almost endless pleading. If the specific facts absolving the plaintiff from fault must be pleaded, then it would be necessary to enumerate every fact that might be considered as tending to charge him with fault, and negative its existence. In some cases, this process of enumeration and exclusion would be practically impossible; in others, it would lead to a prolixity of pleading that would do no good, but would produce uncertainty and confusion.

In the case before us, it is expressly alleged that the injury was caused solely by the defendant's negligence, and without any fault on the part of the plaintiff, and the force of these general averments is not broken by the specific facts pleaded.

It is probably true that there is not that certainty of statement in the allegations of the complaint which charge the defendant with negligence that the strict rules of pleading require, but granting this to be true, it will not avail the appellant, since the remedy for mere uncertainty in statement is by motion, and not by demurrer. It has been long and firmly established in this state that negligence may be charged in general terms, and that if the defendant desires a more

definite statement of the facts, he must move the court to make the complaint more specific: *Pittsburgh etc. R. R. Co.* v. *Nelson*, 51 Ind. 150; *Kessler* v. *Leeds*, 51 Id. 212; *Ohio etc. R'y Co.* v. *Collarn*, 73 Id. 261; *City of Evansville* v. *Worthington*, 97 Id. 282; *Cleveland etc. R'y Co.* v. *Wynant*, 100 Id. 160; *Cincinnati etc. R'y Co.* v. *Gaines*, 104 Id. 526; *Louisville etc. R'y Co.* v. *Jones*, 108 Id. 551.

This rule is not without support in principle, and it is well sustained by the decisions of other courts. A recent writer thus states the rule: "A general averment of negligence in a complaint, declaration, or petition, is sufficient; the particular acts constituting the negligence need not be in detail specifically set out": Black on Proof and Pleading in Accident Cases, 201. Many decisions are cited in support of this doctrine.

Objections to evidence, to be of any avail, must be reasonably specific. The particular objection must be fairly stated. It is not enough to state that the evidence is incompetent, or that it is immaterial and irrelevant. This much is implied in the bare fact of objecting. If it be unnecessary to state the particular objection, quite as well say, "We object," and done with it, since a mere general objection amounts to nothing more, for it is simply tantamount to an expression of the fact that counsel do object. It is no answer to the proposition asserted by the authorities to say that the evidence itself may reveal the objection, for this may be said of all incompetent and irrelevant evidence, when carefully scrutinized, and if this be true, then there would be no reason for requiring a specific objection in any case. But there is reason for requiring the particular objections to be stated with reasonable certainty, for in the hurry of a trial, it cannot be expected that particular objections will occur to the judge, although, if stated, he would readily perceive their force. Counsel, who are presumed to have studied the case, ought to be able to state the particular objections, and if none are stated, it is fair to assume that none exist, since an objection that cannot be particularly stated is not worth the making. The rule is a reasonable one, just to the court, and not burdensome to the parties, and it has been accepted as the law at least since 1846: *Russell* v. *Branham*, 8 Blackf. 277; *Stanley* v. *Sutherland*, 54 Ind. 339; *Shafer* v. *Ferguson*, 103 Id. 90, and cases cited; *Louisville etc. R'y Co.* v. *Falvey*, 104 Id. 409; *McKinsey* v. *McKee*, 109 Id. 209, and cases cited.

Possibly there may be cases where a general objection should be deemed effectual, as, for instance, where it appears upon the face of a written instrument that it cannot, under any conceivable theory, be competent; but however this may be, a general objection cannot be regarded as sufficient in a case like this, where negligence is the issue. Upon such an issue a multitude of facts is often competent, and it is not just to expect that objections will occur to the mind of the trial court upon the bare statement of counsel that they object. But there is another phase of the general rule which makes it imperative on us to pronounce judgment against general objections, and that is this: only the specific objections stated to the trial court are available on appeal. A great number of cases affirm this doctrine: *Wakeman* v. *Jones*, 5 Ind. 454; *Hyatt* v. *Clements*, 65 Id. 12; *Evans* v. *State*, 67 Id. 68; *City of Delphi* v. *Lowery*, 74 Id. 520; 39 Am. Rep. 98.

This doctrine necessarily implies that objections must be specific.

No attack is made on the instructions given by the court, but, on the contrary, they are highly commended by counsel. We are therefore not required to examine them except to ascertain whether they embrace the instructions asked by the appellant and refused by the court. Some of the instructions asked by the appellant are embraced in those given by the court, and others do not correctly express the law, and were for that reason properly refused.

The eighth instruction asked by the appellant is not embraced in those given by the court, and, upon the facts of this case, does, in our judgment, state the law correctly. It reads thus: "Though a railroad company and the public have equal rights at the intersection of the track of the former with a public highway, those operating a train upon the railroad are under no obligations to slacken the speed of such train, or to bring the same to a stop, when they notice a person crossing or about to cross the track at its intersection with the highway; but they may presume that such person will himself take all proper precautions to avoid injury."

In a sense the rights of the traveler and the railroad company upon a highway crossing are equal. Neither has an exclusive right to use it, and both are bound to do what the law requires of them. The right of the company is, however, superior in one respect, and that is, the right to the priority of passage. Of necessity this must be true, since it cannot be

legally possible that trains must be brought to a halt at every highway crossing in order to allow travelers to cross. But we need not discuss the question, for it is put at rest by the authorities: *Chicago etc. R. R. Co.* v. *Boggs*, 101 Ind. 522; 51 Am. Rep. 761; *Louisville etc. R'y Co.* v. *Phillips*, *supra*, and authorities cited.

A traveler who approaches the highway is bound to know that he must yield precedence to the trains, and that he has no right to expect them to slacken speed, much less to stop, and yield him priority of passage. This principle is settled beyond controversy: *Cincinnati etc. R. R. Co.* v. *Butler*, *supra*, and cases cited; *Indiana etc. R'y Co.* v. *Greene*, 106 Ind. 279; 55 Am. Rep. 736; *Belt R. R. Co.* v. *Mann*, 107 Ind. 89.

Mr. Beach says of a traveler about to cross a railway track: "He must assume that there is danger, and act with ordinary prudence and circumspection upon that assumption": Beach on Contributory Negligence, 191. Many cases are cited by this author declaring the duty of the traveler, and asserting that the company is under no obligation to stop its trains or to slacken their speed: Id. 198.

Mr. Wood says: "The law does not require the speed of trains to be slackened on approaching the crossing of a public highway in the country when a team is seen approaching it": 2 Am. Railway Law, 1330.

This rule extends to persons on the track where there is nothing to indicate that they are not at liberty to leave it at will, if, indeed, it does not go much further. We again quote from Mr. Beach: "It is to be presumed that a person of mature years will not stand still upon a railway track and deliberately suffer himself to be run down. It is also a presumption that all men are in the possession of their senses, and will exercise ordinary diligence, in times of danger, to take care of themselves. It is in accordance with these assumptions held that when an engineer of a locomotive-engine sees ahead of him a man upon the track, he may presume that the man possesses ordinary capacity, — that he can see and hear, and reason from cause to effect, — and that as a train approaches him, he will step aside and not be run over": Beach on Contributory Negligence, 394.

We do not deem it necessary to refer to the cases, but we cite as particularly applicable the strongly reasoned case of *Lake Shore etc. R. R. Co.* v. *Miller*, 25 Mich. 274, and refer to a few of our own cases: *Palmer* v. *Chicago etc. R. R. Co.*, 112

Ind. 250, and cases cited; *Indianapolis etc. R'y Co.* v. *Pitzer*, 109 Id. 179; *Terre Haute etc. R. R. Co.* v. *Graham*, 95 Id. 286; 48 Am. Rep. 719, and authorities cited.

It was the right of the appellant, under the evidence, to have the jury specifically instructed that its employees might presume that the appellee would use all proper precautions to avoid injury. There was nothing taking the case out of the general rule. There was no obstruction of the track, the train was in full view, there was nothing to indicate to the person in charge of it that the appellee was not a man of mature years, and at full liberty to leave the track at will. The train was not running rapidly; on the contrary, it was moving slowly, for its speed was not greater than three or four miles an hour. There was no reason why the ordinary presumption should not prevail; there was no infirmity apparent in the appellee, nothing to indicate that he could not easily step from the track, and there was no indication that he would not protect himself by leaving the track before the train reached him. There was nothing, in short, to rebut the natural presumption that he would leave the track in time to avoid injury. Under such circumstances the instruction was right in its statement of the law and was relevant to the issue and the evidence.

The instructions of the learned judge who tried the case are unusually clear and vigorous, but, on the point under immediate mention, we cannot approve their statement of the law, and it is only to this point that we have critically examined them. The fifteenth instruction given by the court contains these statements: "Where a train is approaching or is about to cross at a street-crossing, it is the duty of the engineer to give sufficient signals of the approach of the train, by ringing his bell, or otherwise, as may be usual and not unlawful, and also to approach such crossing at such rate of speed as will enable him to check his train if necessary. More than this cannot be required of the company, unless the engineer has actual knowledge or notice of special circumstances demanding special care, as, for example, knowledge by the engineer of a person on the track under such circumstances as would make it seem uncertain to the engineer whether the person would get off or away from the track in time to avoid being struck by the train." The example given as illustrating the meaning intended to be conveyed by the court gives an erroneous effect to the entire instruction. It appears, therefore, that, instead of giving the law as asked by the appellant, the

court laid down an essentially different rule. It is unnecessary for us to express any further opinion upon this or any other instruction given by the court, and we refrain from doing so.

Judgment reversed.

OBJECTIONS TO EVIDENCE MUST BE SPECIFIC, general objections being unavailable on appeal: See *Briggs* v. *McCabe*, 89 Am. Dec. 503, and cases cited in note.

CONTRIBUTORY NEGLIGENCE, ABSENCE OF, MUST BE PLEADED in Indiana: Note to *McKinney* v. *Springer*, 54 Am. Dec. 470.

RESPECTIVE RIGHTS AND DUTIES OF TRAVELERS AND RAILROADS AT CROSSINGS: See note to *Ernst* v. *Hudson R. R. Co.*, 90 Am. Dec. 780–787. *Wilcox* v. *Rome etc. R. R. Co.*, 100 Id. 446, and note; note to *Ormsbee* v. *Boston & P. R. R. Co.*, 51 Am. Rep. 360–364; *Indiana etc. R. R. Co.* v. *Greene*, 55 Id. 736; *Louisville etc. R. R. Co.* v. *Phillips*, 2 Am. St. Rep. 155, and note.

VANVACTOR *v.* STATE.

[113 INDIANA, 276.]

TEACHER'S RIGHT TO CHASTISE PUPIL IS RESTRICTED to the limits of his jurisdiction and responsibility as a teacher, and is not a general right, like that possessed by a parent.

TEACHER MAY EXACT COMPLIANCE WITH ALL REASONABLE COMMANDS within the limits of his jurisdiction, and may, in a kind and reasonable spirit, inflict corporal punishment upon a pupil for disobedience.

PUNISHMENT INFLICTED BY TEACHER UPON PUPIL SHOULD NOT BE CRUEL OR EXCESSIVE, and ought always to be apportioned to the gravity of the offense, and within the bounds of moderation; but when complaint is made, the calm and honest judgment of the teacher as to what the situation required should have weight, and the reasonableness of the punishment determined by the varying circumstances of the particular case.

INTENT NECESSARY TO SUPPORT CHARGE OF ASSAULT AND BATTERY, IN CASE OF CHASTISEMENT OF PUPIL BY TEACHER, may be inferred from the unreasonableness of the method adopted, or the excess of force employed, but the burden of proving such unreasonableness or excess is upon the state.

TEACHER HAS PRESUMPTION OF HAVING DONE HIS DUTY, in support of his defense, in addition to the general presumption of his innocence, in a prosecution against him for assault and battery in inflicting corporal punishment upon a pupil.

LEGITIMATE OBJECT OF CHASTISEMENT OF PUPIL BY TEACHER IS TO INFLICT PUNISHMENT by the pain which it causes, as well as the degradation which it implies; and it does not follow that a chastisement was cruel or oppressive because pain was produced or abrasion of the skin resulted from a switch used by the teacher.

CHARACTER OF CHASTISEMENT OF PUPIL BY TEACHER, WITH REFERENCE TO ANY ALLEGED CRUELTY OR EXCESS, MUST BE DETERMINED, when a proper weapon has been used, by the nature of the offense, the age, physical and mental condition, as well as the personal attributes of the pupil, and the deportment of the teacher.

CRIMINAL prosecution for assault and battery. The opinion states the facts.

A. C. Capron, for the appellant.

C. P. Drummond, for the state.

By Court, NIBLACK, J. During the month of February, 1887, and for some time afterwards, the appellant, Tyner Vanvactor, was a teacher in and as such had charge of one of the public schools of Marshall County. He was at the time only eighteen years of age. Edward Patrick, a boy then nearly sixteen years old, was one of his pupils. On a Friday afternoon during that month, while the school was in session, Vanvactor directed Patrick to bring in some wood and put it in the stove which warmed the school-room. Patrick did as directed, but while engaged about the stove, and while Vanvactor's face was turned in another direction, he made some antic demonstrations which created a general laugh amongst the other attending children, and made a break in the school exercises. Vanvactor, as a punishment for this breach of good order, required Patrick to stand up by the stove for a considerable time. After school closed, Patrick put on his overcoat to start home, and assuming to claim that by having to stand by the stove he had become very warm and liable to take cold, he put Vanvactor's overcoat on over his own, and started towards his home in a direction different from that in which Vanvactor had to go. Patrick had got several rods away before Vanvactor became aware of what had occurred. He thereupon called to Patrick, and, sending a boy after him, very peremptorily demanded a return of his overcoat, but Patrick refused compliance, and proceeded on his way home with the overcoat. This required Vanvactor to go home, a distance of about a mile, without an overcoat, when the weather was chilly and cold. On the following Monday, when Patrick returned to school, Vanvactor informed him that he stood temporarily suspended, and told him that he (Vanvactor) would see the township trustee and the school director as to the course which ought to be further pursued. During the day, Vanvactor saw the township trustee, who advised him that Patrick should be required either to take a whipping or leave the school, and in this view Vanvactor concurred. On the evening of the same day, Vanvactor told Patrick what had been resolved upon in regard to his punishment. Patrick very

promptly replied that he would not take a whipping. Patrick, nevertheless, returned to school next morning and told Vanvactor that he had consulted the family with whom he lived, and they had advised him to take a whipping and not leave the school, and that he was willing to take a whipping, provided that it should not be inflicted upon him until after the school should be closed in the afternoon, and the other pupils had left the school-house. To this proposition Vanvactor assented. Accordingly, during the day, Vanvactor provided a green switch for the occasion, which was about three feet long and forked near the middle, forming two limber prongs composed of twigs. After the school had closed that afternoon and all others had left, and a few minutes of apparent suspense had intervened, Patrick remarked that it was time for the performance to begin, and assisted in removing a table and in clearing the floor. He then placed himself before and with his face towards the blackboard, and indicated that he was ready to proceed. Vanvactor thereupon struck Patrick nine sharp blows on the back part of his legs between his body and the knee-joints. Patrick at the time made no outcry or complaint, and the switch was not broken. Two or three days later, Vanvactor was arrested on the charge of having committed an assault and battery upon Patrick, in whipping him as stated, and taken before a justice of the peace, where he was tried and convicted. Upon an appeal to the circuit court, a jury found him guilty of an assault and battery as charged, and fixed his fine at one cent, upon which judgment was awarded.

A question was reserved below, and is pressed very earnestly here, upon the alleged insufficiency of the evidence to sustain the verdict.

Patrick testified that Vanvactor laid on the blows hard, as if he was angry, and that after he went home and examined his legs, he found them beat to a jelly. Upon further examination, however, it was made apparent that he meant only that Vanvactor had inflicted hard blows, and had thereby imprinted marks and abrasions upon his legs, which for a time gave him pain and annoyance. Two or three other persons testified to having seen marks and abrasions upon Patrick's legs, but as to the nature and extent of these marks and abrasions their testimony was variant and indefinite.

It was shown, without controversy, that, on the day after the whipping, Patrick came back to school with his skates, and neither made complaint nor manifested any impediment.

Vanvactor testified that he did not hit Patrick what could rightly be called hard blows, but that he intended that the blows he gave should inflict pain; that he was not in the least angry, but was sorry to have to punish Patrick, and did so punish him only under a sense of his duty as a teacher; that Patrick was not an obedient pupil, but had made no serious trouble until the Friday in February hereinabove referred to.

There are, perhaps, some isolated points in the evidence which present some difficulty, but when these are considered in connection with all the other facts and circumstances concerning which there was no controversy at the trial, we are of opinion that the evidence, as a whole, did not sustain the verdict.

The books commonly assume that a teacher has the same right to chastise his pupil that a parent has to thus punish his child. But that is only true in a limited sense. The teacher has no general right of chastisement for all offenses, as has the parent. The teacher's right in that respect is restricted to the limits of his jurisdiction and responsibility as a teacher. But within those limits a teacher may exact a compliance with all reasonable commands, and may, in a kind and reasonable spirit, inflict corporal punishment upon a pupil for disobedience. This punishment should not be either cruel or excessive, and ought always to be apportioned to the gravity of the offense, and within the bounds of moderation. But, plainly, when complaint is made, the calm and honest judgment of the teacher as to what the situation required should have weight, as in the case of a parent under similar circumstances; and where no improper weapon has been employed, the presumption will be, until the contrary is made to appear, that what was done was rightly done. Subject to these general rules, the teacher's right to inflict and the duty of inflicting corporal punishment upon a pupil, and the reasonableness of such a punishment when imposed, must be judged of by the varying circumstances of each particular case: 1 Bishop's Crim. Law, sec. 886, and authorities cited; *Danenhoffer* v. *State*, 69 Ind. 295; 35 Am. Rep. 216.

To support a charge of an assault and battery, it is necessary to show that the act complained of was intentionally committed. But in the case of the chastisement of a pupil, the intent may be inferred from the unreasonableness of the method adopted, o force employed, but the bur-

den of proving such unreasonableness or such excess rests upon the state.

In such a case, in addition to the general presumption of his innocence, the teacher has the presumption of having done his duty in support of his defense: *Commonwealth* v. *Randall*, 4 Gray, 36; *Lander* v. *Seaver*, 32 Vt. 114; 76 Am. Dec. 156; *State* v. *Alford*, 68 N. C. 322; *Commonwealth* v. *Seed*, 5 Pa. Law Jour. 78.

In this case, Vanvactor had not only both of these presumptions in his favor, but all the circumstances tended to prove that he acted with much caution, forbearance, and deliberation in the character as well as the extent of the punishment which he visited upon Patrick. The switch used was not an inappropriate weapon for a boy of Patrick's age and apparent vigor. Patrick's offense as a breach of good deportment in a school was one not to be overlooked or treated lightly. It was calculated and was most likely intended to humiliate Vanvactor in the presence of his pupils, and its tendency was to impair his influence in the government of his school. The motive was apparently revenge for having been required to stand by the stove for a time as a punishment for a previous violation of good order.

When the alternative of leaving the school or taking a whipping was presented to him, Patrick did not object to it, either as unreasonable or unjust. After consultation and mature deliberation, he decided to accept a whipping, on condition that it be administered privately. In a spirit of evident forbearance, the request thus implied was acceded to. With all these preparations in view, Patrick had no reason to expect that the chastisement would be a merely formal and painless ceremony. The legitimate object of chastisement is to inflict punishment by the pain which it causes, as well as the degradation which it implies. It does not, therefore, necessarily follow because pain was produced, or some abrasion of the skin resulted from a switch, that a chastisement was either cruel or excessive.

When a proper weapon has been used, the character of the chastisement, with reference to any alleged cruelty or excess, must be determined by the nature of the offense, the age, the physical and mental condition, as well as the personal attributes of the pupil, and the deportment of the teacher, keeping in view the presumptions to which we have alluded.

All the circumstances lead us to the conclusion that if

Vanvactor really gave harder blows than ought to have been given, the error was one of judgment only, and hence not one of improper or unlawful motive.

The statement of Patrick that Vanvactor laid on the blows hard "as if he was angry," was, when explained and taken in connection with other evidence as stated, too trivial to materially conflict with the conclusion thus reached.

It must be borne in mind that Patrick was not peremptorily required to submit to corporal punishment, but that he accepted that kind of punishment, with all its unpleasant consequences, in preference to a milder, and, latterly, a much more usual and more approved method of enforcing discipline in the schools when grave offenses are committed, and that he made no complaint or protest at the time the blows since complained of were given: *Fertich* v. *Michener*, 111 Ind. 472; 60 Am. Rep. 709.

The judgment is reversed, and the cause is remanded for a new trial.

POWERS AND LIABILITIES OF TEACHERS CONCERNING PUNISHMENT OF PUPILS: See *Lander* v. *Seaver*, 76 Am. Dec. 156, and note 164–167; *State* v. *Pendergrass*, 31 Id. 416, and note 419; *Deskins* v. *Goss*, 55 Am. Rep. 387; *Hutton* v. *State*, 59 Id. 776. The punishment must be moderate, and not excessive: *State* v. *Mizner*, 24 Id. 769; 32 Id. 128; *Dannenhoffer* v. *State*, 35 Id. 216. Reasonable punishment defined: *Patterson* v. *Nutter*, 57 Id. 818.

INDIANA, BLOOMINGTON, AND WESTERN RAILWAY COMPANY *v.* ALLEN.

[113 INDIANA, 308.]

JUDGMENT CANNOT BE COLLATERALLY IMPEACHED BY PARTY on the ground that it is erroneous merely.

DECREE IN ACTION TO QUIET TITLE to land operates to determine all claims to interests therein, whatever their form or character, existing at the time the decree is rendered.

EASEMENT CLAIMED BY RAILROAD COMPANY TO CROSS LAND of another will be cut off by a decree in favor of the owner of the land, in an action to quiet the title thereto, where such easement is not protected by the decree.

DAMAGES ARISING FROM APPROPRIATION OF LAND by railroad company, whether prospective or otherwise, must all be recovered in one action.

DAMAGES WHICH NATURALLY AND PROXIMATELY RESULT from the construction and operation of a railroad are properly recoverable, but remote or purely speculative damages cannot be recovered.

JUDGMENT OF DISMISSAL OF PROCEEDINGS FOR ASSESSMENT OF DAMAGES upon the appropriation of private lands by a railroad company is con-

clusive between the parties upon collateral attack, even though erroneous.

RAILROAD COMPANY COMING INTO POSSESSION OF LANDS as the successor of a trespasser must pay all damages inflicted by the latter.

ACTION for damages for entering upon a strip of plaintiff's land and using it as a track for defendant's railroad.

C. W. Fairbanks, L. Nebeker, H. H. Dochterman, and O. Gresham, for the appellant.

T. F. Davidson, for the appellee.

By Court, ELLIOTT, J. The complaint of the appellee seeks to recover damages from the appellant for entering upon land and using it as a track for its railroad. The facts stated in the third paragraph of the appellant's answer are, in substance, these: In 1870, the Indianapolis, Crawfordsville, and Danville Railroad Company took and appropriated the strip of land in dispute and constructed a railroad thereon. The entry and appropriation were by the license of Maria Brittingham, who was then the owner of the land, and is the appellee's grantor. The appellant succeeded to all the rights of the Indianapolis, Crawfordsville, and Danville Railroad Company, and also entered upon the land as its successor by the license of Maria Brittingham. The appellee, on acquiring title, at once instituted proceedings for the assessment of damages, and damages were assessed in his favor. After the appellant entered, it expended a large sum of money in replacing iron rails with steel rails.

The second paragraph of the reply is addressed to the third paragraph of the answer, and contains these material allegations: That at the May term, 1883, in an action then pending in the Fountain circuit court, the appellee, as the real plaintiff in interest, obtained a judgment against the appellant upon the identical matters in issue, finally adjudicating title to be in the appellee and quieting it in him; that in that action and under the issues there formed all the matters were litigated, and finally determined against the appellant, the defendant to that action. The third paragraph is essentially the same as the second.

We must determine the sufficiency of these replies upon the facts averred in them and confessed by the demurrer. We cannot yield to the appellant's assertion that it was not possible to adjudicate the question of license in the action referred to in the replies. The replies aver, directly and explicitly, that

it was finally adjudicated, and this the demurrer admits to be true. We cannot, of course, affirm that the question was not litigated, or could not be litigated, in that action, in the face of the positive averment that it was litigated and finally determined. We must accept as true the statements of the pleader. They are, indeed, confessed by the demurrer. If we were to concede that it was error to litigate and determine that question, it would do the appellant no good, for, even if there was error, the judgment cannot be collaterally impeached. This principle is so well established that it is not necessary to cite many authorities, and we content ourselves with referring to one very late case upon the question: *Walker* v. *Hill*, 111 Ind. 223.

The appellant's counsel, however, are in error in assuming that the question of the right or interest of their client could not have been litigated in the action to quiet title, for it could have been there litigated and determined: *Indiana etc. R'y Co.* v. *Allen*, 100 Ind. 409.

The right claimed by the appellant is in the nature of an easement, and this right it was challenged to present and litigate in the former action. If it had a valid interest of that nature in the land, it could unquestionably have established it and secured a decree protecting it. In *Davidson* v. *Nicholson*, 59 Ind. 411, it was held that an action would lie to quiet title to an easement; and from the case of *Morgan* v. *Moore*, 3 Gray, 319, this court quoted with approval the language used by that court with reference to the owner of a servient and the owner of a dominant estate: "Each can maintain an action to vindicate and establish his right,—the former, to protect and enforce his seisin in fee; the latter, to prevent a disturbance of his easement." It is obvious that it would defeat the purpose of the statute and much abridge its usefulness if it were held that, notwithstanding a decree quieting title in the plaintiff, a defendant might subsequently assert that he owned an interest in the nature of an easement. We collected many authorities in *Indiana etc. R'y Co.* v. *Allen*, *supra*, in support of the doctrine that a decree in an action to quiet title effectually adjudicated all claims to an interest in the land, whatever their character, existing at the time the decree was rendered and not protected by it. A general decree in an action to quiet title settles all questions affecting the right of the owner to enjoy his land, whatever their form or character. We can find no decision asserting a different doctrine, nor

have counsel referred us to a single case that suggests a different rule.

The fifth paragraph of the reply is addressed to so much of the third paragraph of the answer as relies on the proceedings for the assessment of damages to defeat this action. What was said in the case of *Indiana etc. R'y Co.* v. *Allen*, *supra*, fully disposes of the question presented by the demurrer to this reply.

The appellee has removed the barrier which stood between him and a recovery in the first proceeding instituted by him, for he has both an assignment of the cause of action and a warranty deed. It was for want of the assignment of the claim for damages that he was defeated in that proceeding: *Indiana etc. R'y Co.* v. *Allen*, 100 Ind. 409.

It is settled law that all damages arising from the appropriation of land by a railroad company must be recovered in one action, for successive actions cannot be prosecuted: *City of Lafayette* v. *Nagle*, 113 Id. 425; *City of Terre Haute* v. *Hudnut*, 112 Id. 542; *City of North Vernon* v. *Voegler*, 103 Id. 314, and cases cited.

It was, therefore, proper for the appellee to prove all injuries that might naturally and proximately result from the construction and operation of the appellant's railroad. Of course, remote damages, and those that could not reasonably be expected to result, cannot be recovered, nor can such as are purely speculative. It may be true that the witnesses referred to by the appellant may have embraced in their estimates some improper elements; but this did not, when, as here, developed on cross-examination, render their entire testimony incompetent. What was improper might have been struck out on motion, or eliminated by proper instructions. It is, however, evident, from what we have said, that the fact that prospective damages were included in the estimate of the witnesses did not make it proper to exclude those estimates from the consideration of the jury; on the contrary, it is well settled that such damages, when natural and proximate, are recoverable.

The appellant acquired no rights from its predecessor, for it was a trespasser. As the appellant is in possession of the land in violation of the right of the appellee, it must pay all the damages it has inflicted upon him. This has been so decided, and we feel sure that the decisions are sound: *Lake Erie etc. R'y Co.* v. *Griffin*, 92 Ind. 487; *Lake Erie etc. R'y Co.*

v. *Griffin*, 107 Id. 464; *Bloomfield R. R. Co.* v. *Van Slike*, 107 Id. 480; *Bloomfield R. R. Co.* v. *Grace*, 112 Id. 128. The same general principle is elsewhere asserted: Pierce on Railroads, 167; *Donald* v. *St. Louis etc. R. R. Co.*, 52 Iowa, 411.

It is argued that the dismissal of the proceedings for the assessment of damages was erroneously directed. It is doubtful whether this assumption can be maintained; indeed, the authorities seem to hold otherwise: *Pittsburgh etc. R'y Co.* v. *Swinney*, 97 Ind. 586; *Brokaw* v. *City of Terre Haute*, 97 Id. 451; *Bensley* v. *Water Co.*, 13 Cal. 306; 73 Am. Dec. 575; Mills on Eminent Domain, 2d ed., sec. 311. But if it were granted that the court erred in dismissing the proceedings, that error would be of no avail in this collateral proceeding. An erroneous judgment stands, as between the parties, until overthrown by a direct attack.

It may be that, when the question is properly presented, it will be held that the appellee, by insisting upon his right to damages, has waived his right to enforce the judgment in the action to quiet title. If he elects to accept damages, he cannot, unless the case is taken out of the general rule, disturb the appellant's possession; for he cannot be allowed to occupy inconsistent positions: Bigelow on Estoppel, 642. But this question is not now so presented that we can authoritatively decide it.

If the appellant had elected to abide by the judgment for damages, and had yielded to it, it would be very doubtful whether this action could be maintained; for we incline to the opinion that the appellee could not split his cause of action; but the question is not properly presented to us, and we do not decide it.

We cannot say that the damages are excessive, and therefore decline to disturb the verdict on that ground.

Judgment affirmed.

JUDGMENT CANNOT BE COLLATERALLY IMPEACHED BY PARTY BECAUSE ERRONEOUS MERELY: See *Skrine* v. *Simmons*, 91 Am. Dec. 771; and *Pursley* v. *Hayes*, 92 Id. 350, and notes.

EFFECTS OF JUDGMENTS AND DECREES AS RES ADJUDICATA, GENERALLY: See note to *Lea* v. *Lea*, 96 Am. Dec. 775–788.

DAMAGES IN EMINENT DOMAIN CASES, GENERALLY: See the note to *Winona etc. R. R. Co.* v. *Waldron*, 86 Am. Dec. 113–121.

CONNECTICUT MUTUAL LIFE INS. CO. *v.* TALBOT.

[113 INDIANA, 573.]

INDORSEMENT OF NOTE SECURED BY MORTGAGE OPERATES as an equitable assignment of the mortgage.

ASSIGNEE OF MORTGAGE WHO FAILS TO RECORD HIS ASSIGNMENT will be estopped from asserting the priority of his mortgage over that of a subsequent mortgagee who took upon the faith of a release executed by the administratrix of the original mortgagee and entered of record.

FINDING THAT AGENT OF CORPORATION ACTED IN RELIANCE upon a record of release of a mortgage, without knowledge that it had been paid, is a sufficient finding that the corporation had no notice of the fact that the mortgage had not been paid.

STATUTES WILL BE CONSTRUED SO AS TO EFFECT PURPOSES for which they were enacted, and if necessary to that end, they will be held to be retroactive, although they do not in terms so direct, unless this would result in the impairment of some vested right or the violation of some constitutional guaranty.

IN CONSTRUING STATUTES, COURTS, IN ORDER TO ASCERTAIN the intention of the legislature, will judicially notice such contemporaneous history as led to and probably induced the passage of the laws.

THE facts are stated in the opinion.

S. J. Peelle and W. L. Taylor, for the appellant.

J. S. Duncan, C. W. Smith, and J. R. Wilson, for the appellees.

By Court, MITCHELL, C. J. The questions for decision arise upon facts specially found by the court. Those facts, so far as they are material, are as follows: On May 3, 1871, Talbot and wife executed a mortgage, which was afterwards duly recorded, to the Thames Loan and Trust Company to secure a loan of three thousand dollars, payable on the third day of May, 1876. On the thirty-first day of January, 1874, the same mortgagors executed another mortgage conveying the same property to William H. Morrison to secure another debt of three thousand dollars. This last debt was evidenced by a promissory note payable to Morrison or order, one year after date. The mortgage recited that it was given as a security for the debt evidenced by the above-mentioned note, and also to secure any renewal of the note therein described. This mortgage was also duly recorded. Before the note matured, Morrison assigned it to Tomlinson by a written indorsement on the back thereof. There was no assignment of the mortgage, otherwise than as it was carried by the indorsement written upon the note, and there was hence nothing upon the record to indicate that the note and mortgage were not held and owned by the

mortgagee. The note thus secured and assigned was renewed annually, the maker giving a new note at the end of each year, of like tenor as the first, payable to Tomlinson. The renewal notes were indorsed by Morrison. On the fifteenth day of March, 1881, Morrison died, and, shortly thereafter, his widow, Mary Morrison, became the duly qualified administratrix of his estate.

The debt to the trust company had become due. It had been renewed, and had fallen due a second time.

Talbot negotiated a loan of three thousand dollars with the Connecticut Mutual Life Insurance Company. The loan was negotiated with Mr. Moore as agent of the insurance company. The money so negotiated for was designed to be used in paying off the debt due to the trust company, and secured by the trust company mortgage above mentioned. Mrs. Morrison, as administratrix of the estate of William H. Morrison, executed a release of the Morrison mortgage. This release was executed and recorded on the eleventh day of October, 1881. Tomlinson had no knowledge of the release, nor had he given authority to any one to release the mortgage. The debt held by him had not been paid. On the same day that the Morrison mortgage was released, Talbot and wife conveyed the same real estate to the insurance company as a security for the loan of three thousand dollars, negotiated from it through its agent, Moore. The money thus borrowed was paid over to the trust company in satisfaction of the debt due it from Talbot, which indebtedness was secured by a renewal of the first mortgage taken by it on the real estate in question. Moore, who acted as the agent for the insurance company in making the loan to Talbot, had been furnished with an abstract of title to the land mortgaged some time prior to the loan, and thereby he knew of the Morrison mortgage; but at the time the loan was made to Talbot the release executed by the administratrix had been put on record. The release recited that the mortgage had been fully paid and satisfied, and Moore had no knowledge that it was not paid. The court, in its finding, draws the inference that Moore did not demand the production of the Morrison note and mortgage, nor make any inquiry as to the authority of the administratrix to execute the release.

It should be observed that at the time the trust company took its second or renewal mortgage, in 1876, William H. Morrison, by an entry on the mortgage record, waived the

priority of the Morrison mortgage over that last taken by the trust company. This was done without authority from Tomlinson.

Upon the facts found, the superior court was of opinion that the release and satisfaction piece executed by Mrs. Morrison, and placed of record, was not effectual as against Tomlinson, the assignee of the Morrison note and mortgage, and it was accordingly decreed that the Morrison mortgage have priority over that of the insurance company, notwithstanding the release.

That the indorsee of a promissory note secured by mortgage succeeds to the benefits of the mortgage security, even though the latter be not formally assigned, is a familiar proposition.

The written indorsement of the payee on the note carries the legal title therein to the indorsee, and the mortgage being a mere incident to and security for the debt, the assignee of the note becomes equitably entitled to participate in the security to the extent of his interest or ownership in the debt. The right of such an assignee to participate in the mortgage is wholly equitable, and grows out of the fact that equity regards the mortgage as being merely accessory.

It is, of course, certain that, as between the mortgagee and his assignee, and all others having notice of their respective rights, the former can do nothing to prejudice the rights of the latter after the debt has been assigned.

Whether the assignment of a mortgage was such an instrument as was entitled to be recorded prior to the act which came in force July 2, 1877, or whether prior to that act an assignment could be so made on the record as that in either case the record would operate as notice of the assignment, and to what extent innocent purchasers and subsequent mortgagees, who advanced money on the faith of a release entered of record by a prior mortgagee, might rely upon such release, have heretofore been subjects of more or less extended discussion and consideration by this court: *Reeves* v. *Hayes*, 95 Ind. 521.

Whatever conclusion we might arrive at, as at present advised, in respect to whether or not assignments of mortgages were within the recording acts prior to July 2, 1877, there is no room to doubt but that such assignments are affected by the act last above named. Whether or not the questions considered in *Reeves* v. *Hayes*, *supra*, are longer of any general

importance, it is clear that they are of no practical moment as applied to the present case.

It is assumed everywhere that, if the recording acts afford the assignee of a mortgage the opportunity of giving notice of his rights by procuring and putting of record an assignment of the mortgage, neglect on his part to do so will estop him from asserting the invalidity of a duly recorded release executed by his assignor, after an innocent purchaser has paid his money on the faith of the public records. It is settled everywhere that unrecorded assignments of mortgages are void as against subsequent purchasers whose interests may be affected thereby, and whose conveyances are duly recorded, provided such assignments are embraced by the recording acts: *Bacon* v. *Van Schoonhoven*, 87 N. Y. 446; *Decker* v. *Boice*, 83 Id. 215; *Swartz* v. *Leist*, 13 Ohio St. 419; *Yerger* v. *Barz*, 56 Iowa, 77; *Henderson* v. *Pilgrim*, 22 Tex. 464; Boone on Mortgages, sec. 92; 1 Jones on Mortgages, sec. 472; *Reeves* v. *Hayes*, *supra*, and authorities there cited.

The effect of the act of 1877, construed in connection with section 2931, was to postpone or render assignments of mortgages void as against any subsequent purchaser or mortgagee in good faith, for a valuable consideration, unless such assignments were recorded as therein provided.

It follows that, when assignments of mortgages are within the recording acts, a release executed by the person who appears by the records to be the owner of the mortgage is sufficient to protect a purchaser who has in good faith parted with his money on the faith of such a release, and without other notice than that afforded by the record: *Blunt* v. *Norris*, 123 Mass. 55.

The act which went into force July 2, 1877 (R. S. 1881, secs. 1093, 1094), provides that "any mortgage of record, or any part thereof, may be assigned by the mortgagee, or any assignee thereof, either by an assignment entered on the margin of such record, signed by the person making the assignment and attested by the recorder, or by a separate instrument executed and acknowledged," etc. It also provides that the assignment, if by a separate instrument, may be recorded on the margin of the record where the mortgage is recorded, or in the mortgage record of the county. And it provides further that, after the assignment is so made or entered of record, the mortgagor and all other persons shall be bound thereby. It also authorizes any assignee, or his per-

sonal representative, to release or enter satisfaction of the mortgage of record.

It is argued that because the debt secured by the Morrison mortgage was assigned to Tomlinson before the act of 1877 took effect the assignee was not affected by the provisions of that act, notwithstanding he accepted renewals of the note, and allowed the mortgage to stand on the record in the name of his assignor for some four years after the act referred to came into force.

It is assumed that, where an equitable assignment of a mortgage had been effected prior to the enactment above mentioned, the assignee might, nevertheless, permit the legal title to the mortgage to remain of record in the original mortgagee, and that an unauthorized release by such mortgagee would be at the risk of an innocent purchaser, who relied upon the record.

This argument is supported upon the general proposition that statutes are to be construed and applied prospectively, unless a contrary intent is manifested in clear and unambiguous terms. This is undoubtedly the general rule; and it is sometimes held that, to work an exception, the intent favoring retrospective application must affirmatively appear in the words of the statute. The better rule of construction, and the rule peculiarly applicable to remedial statutes, however, is, that a statute must be so construed as to make it effect the evident purpose for which it was enacted; and if the reason of the statute extends to past transactions as well as to those in the future, then it will be so applied, although the statute does not in terms so direct, unless to do so would impair some vested right, or violate some constitutional guaranty: *People* v. *Spicer*, 99 N. Y. 225; *Larkin* v. *Saffarans*, 15 Fed. Rep. 147; *Excelsior Mfg. Co.* v. *Keyser*, 62 Miss. 155; *Baldwin* v. *City of Newark*, 38 N. J. L. 158; *People* v. *Clark*, 7 N. Y. 385; Bishop on Written Laws, sec. 84.

Limitation laws which operate on subsisting contracts, and laws which regulate the registration of existing conveyances or instruments affecting titles to lands, are within the operation of this rule when a reasonable time is given within which the effect of such a statute, as applied to existing conveyances, may be avoided and rendered harmless in respect to vested rights: *Tucker* v. *Harris*, 13 Ga. 1; 58 Am. Dec. 488; *Boston* v. *Cummins*, 16 Ga. 102; 60 Am. Dec. 717; *Jackson* v. *Lamphire*,

3 Pet. 280; *Tarpley* v. *Hamer*, 17 Miss. 310; Wade on Retroactive Laws, sec. 13.

In ascertaining the intent of the legislature in the enactment of a statute, courts will take judicial notice of such contemporaneous history as led up to and probably induced the passage of the law: *Stout* v. *Board etc.*, 107 Ind. 343.

The case of *Hasselman* v. *McKernan*, 50 Ind. 441, in which it was for the first time authoritatively declared that no statute existed in this state which made provision for the recording of assignments of mortgages, and for making such records notice, was decided at the May term, 1875. At the ensuing session of the legislature the act under consideration was passed. No reasonable doubt can be entertained but that it was intended to remedy the defect which was declared to exist in the registry law.

The act conferred no new nor did it affect any existing rights. Mortgages were assignable before the enactment of the statute of 1877; but because it had been declared that there was no statute authorizing such assignments to be recorded, so as to make such records notice, it was deemed expedient to afford the means whereby assignees of real estate mortgages, as well as innocent purchasers of mortgaged real estate, might be protected. The reason and policy of the act applied with as much force to assignments such as that here involved as to those which should be made after it took effect.

The act applied by its terms to "any mortgage of record" at the time it took effect, the same as to any mortgage which might thereafter be recorded. The Morrison mortgage was a mortgage of record at the time the act in question took effect, but it had not been assigned to Tomlinson except as the indorsement of the note carried an equitable interest in the security. The act of 1877, as applied to that mortgage, and all others similarly held, impaired no existing right of any assignee; it simply enlarged the opportunities of assignees for giving notice of and protecting existing rights, and it left to each the option to procure and record an assignment of his mortgage in the manner provided, or to take the chance that his assignor, who held the legal title to his security in trust for him, would act in good faith, and not release the mortgage to his detriment.

An act cannot be said to impair a security which affords the opportunity of more effectually protecting it, and which

leaves it entirely at the discretion of the owner whether he will pursue it or not: *Tarpley* v. *Hamer*, *supra*.

A statute which has for its purpose the better security and repose of titles may postpone one who voluntarily neglects to avail himself of registry acts, which enable him to give notice to all the world of his claim, to the claim of a subsequent purchaser who acted on the faith of a public record: *Kenyon* v. *Stewart*, 44 Pa. St. 179; *Jackson* v. *Lamphire*, *supra*.

An assignee of a mortgage who had an assignment duly acknowledged prior to the taking effect of that act needed only to put his assignment of record within the time prescribed in section 2931, Revised Statutes 1881, or before the intervention of an innocent purchaser for a valuable consideration. On the other hand, one who occupied the position of an equitable assignee merely had it in his power, in case the assignor of the debt refused voluntarily to make a legal assignment of the mortgage, to compel the execution of all such muniments of title as were essential to the complete protection of his rights: *Wade* v. *Guppinger*, 60 Ind. 376; *Eichholtz* v. *Taylor*, 88 Id. 38.

Taking into account the circumstances which occasioned the enactment of the statute under consideration, together with what appears upon the face of the act itself, and we entertain no doubt of the propriety of applying it to transactions such as that involved in the present case. A contrary holding would produce a state of uncertainty and confusion in respect to the validity of releases of mortgages, which the legislature intended to avoid by the act in question. The universal rule in respect to statutes such as that under consideration is, that they are to be liberally construed: *Swartz* v. *Leist*, *supra*; *Kenyon* v. *Stewart*, *supra*.

It is suggested in the brief that, because the release of the Morrison mortgage appeared on its face to have been executed by the administratrix of the mortgagee, it became the duty of the subsequent mortgagee to demand the production of the note, and to make inquiry as to whether or not the mortgage debt was actually paid, or whether the administratrix had authority to release the mortgage.

It is quite true that where a mortgage appears to have been discharged by an attorney, clerk, or some one other than the mortgagee, it has been held sufficient to excite inquiry as to the reason of the unusual circumstance: *Smith* v. *Kidd*, 68 N. Y. 130; 23 Am. Rep. 157; *Harris* v. *Cook*, 28 N. J. Eq. 345;

Swarthout v. *Curtis*, 5 N. Y. 301; 55 Am. Dec. 345; Wade on Notice, sec. 20; 2 Jones on Mortgages, sec. 957.

In the present case the mortgage was released by the only person who, so far as the record disclosed, had the legal right or authority to execute a release. The statute (section 2265) gave authority to executors or administrators to release and discharge mortgages when the debts thereby secured had been paid. After the administratrix, thus authorized by public law, had solemnly declared over her hand and seal, in an instrument which had been delivered to and placed of record by the mortgagor, that the mortgage debt had been fully paid and satisfied, subsequent mortgagees, who acted in good faith, without notice, had a right to rely upon the record without further inquiry: *Williams* v. *Jackson*, 107 U. S. 478; *Ogle* v. *Turpin*, 102 Ill. 148; *Bacon* v. *Van Schoonhoven*, *supra*; *Ely* v. *Schofield*, 35 Barb. 330; *Henderson* v. *Pilgrim*, *supra*.

The subsequent mortgagee in the present case was a corporation. The findings of the court show that the loan to Talbot was negotiated and the transaction consummated by and through the agency of a Mr. Moore, who acted as the agent of the corporation in negotiating the loan and in taking the mortgage. The findings show that Moore had no knowledge that the Morrison mortgage was not paid. It is suggested that this finding does not negative the idea that the insurance company may have had knowledge. As corporations can only act through agents, a finding that the agent who transacted the business in question acted without knowledge, in reliance upon the record, is a sufficient finding that the corporation for which he acted had no notice. This we say without regard to the question as to who assumes the burden of proof in a case like this.

Without considering whether or not the insurance company would be entitled upon principles of subrogation to occupy the place, and avail itself of the securities of the trust company whose debt was discharged by the insurance company, the conclusion follows from what has already been said that the judgment of the superior court must be reversed.

The judgment is accordingly reversed, with costs, with directions to the court to restate its conclusions of law, and to render judgment thereon in accordance with this opinion.

INDORSEMENT OF NOTE SECURED BY MORTGAGE OPERATES AS EQUITABLE ASSIGNMENT OF MORTGAGE: See *Herring* v. *Woodhull*, 81 Am. Dec. 296; *Pardee* v. *Lindley*, 83 Id. 219; *Indianapolis Bank* v. *Anderson*, 83 Id. 390, and notes.

CONSTRUCTION OF STATUTES, RETROACTIVE EFFECT WHEN GIVEN: See *Seamans* v. *Carter*, 82 Am. Dec. 696; *Williams* v. *Johnston*, 96 Id. 613, and notes.

COURTS WILL NOTICE COTEMPORANEOUS HISTORY IN CONSTRUING STATUTES: See *Harrison* v. *State*, 85 Am. Dec. 581; *Munson* v. *Hallowell*, 84 Id. 581; *Frankland* v. *Hallowell*, 84 Id. 582, and notes.

STATE EX REL. CARSON *v.* HARRISON.

[113 INDIANA, 284.]

AUTHORITY CONFERRED BY LAW UPON EXECUTIVE TO FILL VACANCIES in office by appointment does not confer upon him the power of ultimately determining whether the vacancies actually exist, and a claimant has the right to have such question determined in the courts.

VACANCY IN OFFICE. — Under the provision of the Indiana constitution that "officers shall continue in office until their successors are elected and qualified," no vacancy occurs which the governor can fill by appointment, where one holding an appointive office under the general assembly continues to hold it after the expiration of his term, no successor having been appointed by the assembly.

TENURE OF OFFICE. — The provision of the Indiana constitution that "the general assembly shall not create any office the tenure of which shall be more than four years" does not prevent one who holds an office created by the general assembly, the term of which is four years, from holding over, after the expiration of his term, until his successor be elected and qualified.

ACTION to determine the right of the relator to act as president of the several boards of trustees of the benevolent institutions of the state of Indiana.

L. T. Michener, attorney-general, E. K. Adams, L. J. Hackney, J. S. Duncan, C. W. Smith, and J. R. Wilson, for the appellant.

F. Winter, A. Baker, E. Daniels, T. L. Sullivan, A. Q. Jones, C. S. Wesner, O. D. Wesner, R. W. Harrison, and B. S. Higgins, for the appellee.

By Court, MITCHELL, C. J. The present case involves a controversy between the relator, Joseph L. Carson, and the respondent, Thomas H. Harrison, concerning the right to exercise the office of president of the several boards of trustees of the benevolent institutions of the state. The decision of the case depends upon the following facts: —

On the twenty-first day of February, 1883, the general assembly, by an act duly passed, vested the management of the benevolent institutions in three several boards of trustees, and

provided for the election of one president for the three boards. The act provided that, upon the taking effect thereof, the general assembly should elect a president of the several boards, and that if a vacancy occurred when the legislature was not in session, such vacancy should be filled by appointment by the governor, the appointment to hold good only until the session of the following general assembly. The act provided further, that the term of office of the president of the boards should be four years, dating from the date of his election, and it made it the duty of the general assembly to elect a president of the boards every four years. Pursuant to the provisions of the act, the respondent was elected president of the boards on the twenty-seventh day of February, 1883. The legislature failed to elect a successor in February, 1887, as the law required, and the respondent continued and still continues in the office, asserting the right to hold over until a successor shall have been duly elected by a succeeding legislature. Being of opinion that the failure of the general assembly to elect a successor produced a vacancy in the office, the governor appointed and commissioned the relator as president of the several boards on the twenty-seventh day of May, 1887. The relator having duly qualified, and made demand, and being refused admittance into the office by the respondent, he prosecutes this suit in the name of the state, on his own relation, for the purpose of establishing his claim to the office. On his behalf it is argued that the office became vacant on the twenty-seventh day of February, 1887, and that, in consequence of the failure of the general assembly to appoint a successor to the respondent before the adjournment of its session in 1887, it became the duty of the governor to supply the vacancy by appointment, under section 18, article 5 (R. S. 1881, sec. 144), of the constitution of the state.

So much of the above-mentioned section as applies to the office in dispute reads as follows: "When, during a recess of the general assembly, a vacancy shall happen in any office, the appointment to which is vested in the general assembly, ... the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified."

On the other hand, it is contended that, notwithstanding the failure of the general assembly to elect, the office did not become vacant, because it is said the respondent was and continues entitled to hold over until a duly qualified successor

shall appear, who shall have been duly elected by the general assembly in the manner provided by the act of February 21, 1883. Moreover, it is insisted, conceding the office to have become vacant, that the power of the governor to supply vacancies, such as that under consideration, is confined to such as happen during the recess of the general assembly. Hence, the argument proceeds, if the office in question became vacant at all, the vacancy happened while the general assembly was in session, and therefore, within the terms of the section relied on, the governor had no power to appoint.

Avoiding for the present so much of the controversy as relates to the power of the governor to supply a vacancy in an office, the appointment to which is vested in the general assembly, when such vacancy happens at a time when the body in whom the primary power of filling the office resides is in session, we come at once to the controlling question, and inquire whether or not the office became vacant at the expiration of four years from the date of the respondent's election, four years, as we have seen, being the term prescribed by the act under which the office was created.

Whatever question there may be as to the particular time when the vacancy must have happened so as to have authorized an appointment by the governor, it is beyond dispute that the office must have become legally vacant at some time before the executive function could have been called into exercise so as to make an appointment.

Although it has often been held that where it appears *prima facie* that acts have been done or that events have occurred which subject an office to a judicial declaration of vacancy, the appointing power is authorized to proceed and appoint without procuring the office to be judicially declared vacant, it is nevertheless a condition precedent to the power to appoint that an actual vacancy shall have occurred: *State* v. *Jones*, 19 Ind. 356; 81 Am. Dec. 403; *Mowbray* v. *State*, 88 Ind 324; *Baker* v. *Wambaugh*, 99 Id. 312; *Gosman* v. *State*, 106 Id. 203.

While it is the right of the executive department to determine for its own guidance whether or not a vacancy exists in each particular case, and while every intendment is to be indulged in favor of the action of the executive, it must nevertheless be borne in mind that the power of the governor to make a valid appointment does not arise until there is a vacancy in fact. The existing title of an incumbent cannot be extinguished or affected by the *ex parte* judgment of the execu-

tive that the office is vacant. The authority to fill vacancies confers upon the governor no judicial power: *State* v. *Seay*, 64 Mo. 89.

The final adjudication of such a right is, unless otherwise specially provided by competent authority, a matter of judicial concern, in respect to which the prior claimant is entitled to be heard in a forum whose proceedings are distinguished by the cautionary methods appropriate to the ascertainment and protection of personal and property rights: *Page* v. *Hardin*, 8 B. Mon. 643; *Commonwealth* v. *Meeser*, 44 Pa. St. 341; *Dullam* v. *Willson*, 53 Mich. 392.

The effect of an executive appointment, and the rights acquired by the appointee, are therefore dependent upon whether or not the office was without an incumbent, lawfully entitled to continue therein at the time the appointment was made: *State* v. *McNeely*, 24 La. Ann. 19.

The word "vacancy," as applied to an office, has no technical meaning. An office is not vacant so long as it is supplied in the manner provided by the constitution or law with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it; and, conversely, it is vacant in the eye of the law whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event: *Stocking* v. *State*, 7 Ind. 326; *Collins* v. *State*, 8 Id. 344; *Akers* v. *State*, 8 Id. 484; *State* v. *Bemenderfer*, 96 Id. 374; *Gosman* v. *State*, *supra*; *Butler* v. *State*, 20 Id. 169; *People* v. *Tilton*, 37 Cal. 614; *State* v. *Lusk*, 18 Mo. 333; *Commonwealth* v. *Hanley*, 9 Pa. St. 513.

When an office has been conferred upon one legally eligible, and has been accepted, no vacancy can be said to exist therein until the term of service and right to hold as fixed by the law expires, or until the death, resignation, or removal of the person elected or appointed: *Johnston* v. *Wilson*, 2 N. H. 202; 9 Am. Dec. 50.

Of course, it is not to be understood that an office cannot become vacant, as respects the appointing power, so long as it remains in the actual physical occupancy of some one who asserts a claim thereto. An office is legally vacant unless the occupant has an unexpired right or title, founded in the constitution or law, precisely as a house is vacant of a lawful tenant in case the lessee, without any provision authorizing him to hold over, refuses to surrender at the expiration of his term.

The inquiry then comes to this complexion: Had the respondent's lawful right to continue in the office of president of the several boards having the management of the state's benevolent institutions expired prior to or at the time of the relator's appointment? If it had, the office was vacant in law, and the respondent's continuance therein, in defiance of the executive appointment, is in the nature of usurpation. If it had not, the power of executive appointment had not arisen, and the designation of the relator by the governor was futile and ineffectual.

That the fixed term of four years for which the respondent had been elected had expired prior to the relator's appointment is beyond dispute, and it is therefore quite certain that the decision of the question must depend upon whether or not the respondent had the right to hold over until his successor was elected and qualified by the body authorized to make the original selection, or whether a vacancy occurred at the expiration of four years.

Whether or not, as a general principle of the common law, officers are entitled to hold over beyond their prescribed terms without some express provision is not settled upon authority, although the view adopted by the American courts seems to be that, in the absence of any restrictive provision, the officer is entitled to hold until he is superseded by the election of another person in his place: *Tuley* v. *State*, 1 Ind. 500; *People* v. *Runkle*, 9 Johns. 147; *Trustees* v. *Hills*, 6 Cow. 23; 16 Am. Dec. 429; *McCall* v. *Byram Mfg. Co.*, 6 Conn. 428; *State* v. *Fagan*, 42 Id. 32; *Sparks* v. *Farmers' Bank*, 3 Del. Ch. 274; *Stratton* v. *Oulton*, 28 Cal. 44; *People* v. *Bull*, 46 N. Y. 57; 7 Am. Rep. 302; 1 Dillon on Municipal Corporations, sec. 219.

Whatever the rule of the common law may have been, it is quite certain that where, by the constitution or law, officers are elected for a term, and until their successors are elected and qualified, they are thereby authorized to continue to hold and exercise their offices until they are superseded by the election of other persons in their places: *Tuley* v. *State*, *supra*; *Miller* v. *Burger*, 2 Ind. 337; *Baker* v. *Kirk*, 33 Id. 517; *State* v. *Berg*, 50 Id. 496; *Gosman* v. *State*, *supra*; *Elam* v. *State*, 75 Id. 518.

The policy of provisions of that nature is to prevent the happening of vacancies in office, except by death, resignation, removal, and the like. They rest upon the assumption that the wiser and more prudent course is, in case the electoral body fails to discharge its functions, to authorize the incum-

bent to hold over until the succeeding election, rather than that a vacancy should occur to be filled by the appointing power.

In recognition of the wisdom of this policy, the organic law of the state, section 3, article 15 (R. S. 1881, sec. 225), declares as follows: "Whenever it is provided in this constitution, or in any law which may be hereafter passed, that any officer, other than a member of the general assembly, shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified."

The effect of the foregoing provision is more than to supply the office until an executive appointment can or shall be made with a person qualified to discharge its duties. It adds an additional contingent and defeasible term to the original fixed term, and excludes the possibility of a vacancy, and consequently the power of appointment, except in case of death, resignation, ineligibility, or the like: *Gosman* v. *State*, *supra*, and cases cited.

Thus in *People* v. *Whitman*, 10 Cal. 38, the court said of a similar provision: "The term of the office is fixed at two years certain, with a contingent extension. When this contingency happens, this extension is as much a part of the entire term as any portion of the two years. The language of the constitution is just as clear and express that the governor shall hold his office until his successor is qualified as it is that he shall hold it two years. . . . . These two provisions are both contained in the same sentence, closely connected by the copulative conjunction; and both relate to the term for which this officer shall hold his office": *Commonwealth* v. *Hanley*, *supra*.

The decisions of this court uniformly declare the law consistent with the principles above enunciated: *Gosman* v. *State*, *supra*, and cases cited; *State* v. *Howe*, 25 Ohio St. 588; 18 Am. Rep. 321; *Hubbard* v. *Crawford*, 19 Kan. 570.

It is certain, therefore, that all offices to which the above constitutional provision applies are held by the same title, or by as high and lawful tenure, after the prescribed term, until the title of a duly elected and qualified successor attaches, as before and during such term.

This right to hold over continues until a qualified successor has been elected by the same electoral body as that to which the incumbent owes his selection, or which by law is entitled

to elect a successor: *Goeman* v. *State*, *supra*; *State* v. *Lusk*, *supra*; *People* v. *Tilton*, *supra*; *Ex parte Lawhorne*, 18 Gratt. 85; *Johnson* v. *Mann*, 77 Va. 265; *State* v. *Jenkins*, 43 Mo. 261.

Tacitly conceding all that has thus far been said, it is contended on the relator's behalf that the constitutional provision under which officers are entitled to hold over until their successors are elected and qualified has application solely to such officers as are elected by the electoral body at large, and that it does not embrace officers elected by the legislature or any other organized body.

It is said that, according to the most approved definitions, the words "elect" and "appoint" are not legally synonymous.

As a general proposition, and for the purposes of this case, this may be conceded; but the question is not what is the best or primary definition of the terms "elect" and "appoint," or whether or not they are legally the equivalent of each other. It is rather to ascertain the sense in which the term "elected" was employed by the framers of the constitution in the above section, which authorizes officers to hold over until their successors shall have been elected and qualified. By attending to the provisions of the constitution, it will be found that whenever the selection of an officer is referred to the people or to an organized body, as the legislature, for example, it is called an election, or the term "elect" or "elected" is employed, and whenever such selection is referred to the governor or other functionary, it is called an appointment.

Thus it is provided (section 13, article 2, which pertains to "suffrage and elections") that "all elections by the people shall be by ballot, and all elections by the general assembly, or by either branch thereof, shall be *viva voce*."

Again, in section 30, article 4, it is provided that no senator or representative shall be eligible to any office the election of which is vested in the general assembly.

Section 5, article 5, provides that in a certain contingency the general assembly shall elect a governor, or lieutenant-governor, as the case may be.

It is thus apparent that the power to choose officers by election, as that term was employed in the constitution, is in some instances expressly, and in others by implication, conferred upon the general assembly as well as upon the people at large.

Reference might be made to other sections of the consti-

stution in which selections to office by the people at large, or by the general assembly, are designated by the terms "elect" or "elected."

In no case, save only in section 18 of article 5, to be noticed hereafter, is the selection to office, either by the electoral body at large or by the general assembly, characterized in any other manner than as an election. On the other hand, by the section last above referred to, the governor is required to fill vacancies in office by appointment, and he is authorized by a subsequent provision to appoint the adjutant, quartermaster, and commissary-generals.

While, therefore, it is entirely accurate to say that an appointment is not the equivalent of an election in a constitutional sense, in determining the right of an incumbent to hold until his successor is elected, as in *Gosman* v. *State*, *supra*, or when passing upon the title of officers who were appointed, when the law required them to be elected, as in *Speed* v. *Crawford*, 3 Met. (Ky.) 207, it is, in our judgment, a fundamental error to assume that a selection to office by the general assembly, when that body is expressly authorized to elect, is not an election in the constitutional sense.

As a matter of course, when an officer is entitled to hold over until his successor has been elected and qualified, or when the constitution or law provides that an office shall be filled by election, either by the people or by a designated body, no latitude of construction can justify the reading of "elected" as a synonym of "appointed," so as to authorize the selection to be made in such cases by the appointing power. Moreover, when the constitution or law provides that an office shall be filled by election, without expressly or by necessary implication defining the electoral body to whom the power of choosing is committed, the presumption is that the election is to be referred to the people of the civil or political division for which the officer is to be elected: *State* v. *Irwin*, 5 Nev. 111, 121; *Magruder* v. *Swann*, 25 Md. 173, 214.

In a constitutional sense, so far as respects the right of an officer to hold until his successor, or until a successor, shall have been elected or qualified, the term "elected" is to be understood as entitling the incumbent to hold until his successor shall have been selected or designated by the people, or by a duly organized body to whom the power of selection has been by law reserved, or upon whom it has been conferred, at the time and substantially in the manner provided by the consti-

tution or law creating the office. It can have no application at all except to offices to which there is a fixed term annexed.

Thus to apply the term is not only etymologically correct, but it renders the several provisions of the constitution consistent, symmetrical, and easy of application, and effectuates the evident intention of its authors. Turning again to section 18 of article 5, it will be seen that it provides, in case a vacancy happens in any office the appointment of which is vested in the general assembly, that "the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified." As applied to an officer whose selection is vested in the general assembly, it is apparent that the terms "appointment" and "elected" are used interchangeably in the above section. This follows necessarily for the reason that the person appointed by the governor to fill the vacancy has a constitutional right to hold until a successor shall have been elected and qualified. If the construction should prevail that the word "elected" can only be referred to designations to office by the people at large, then there never could be a successor elected to an office whose appointment is vested in the legislature.

It will be seen that the section of the constitution, under which officers who hold for a given term are authorized to hold over until their successors shall have been elected and qualified, makes no reference to the method by which the officers so entitled were or how their successors are to be elected. It would seem, therefore, unless the term "elected," *ex vi termini* and of necessity, imports an election by the people at large, to the exclusion of all other modes, that this provision must necessarily extend to all methods of selection to office which are recognized in the constitution and laws as elections.

The constitution, as we have seen, recognizes the right of the general assembly to elect officers, and the act creating the office in dispute provides that upon the taking effect of the act the general assembly shall "elect" a president of the boards, and that every four years thereafter a president shall be "elected." It is clear to our minds that such an election is within the constitutional provision authorizing an incumbent to hold over.

Our conclusion at this point is, that the relator's assumption that the provision of the constitution respecting the right of officers to hold over until their successors are elected and qualified does not apply to officers elected by the general as-

sembly is radically erroneous, and that it is an error which lies at the root of his case, and affords, substantially, the only plausible foundation upon which his contention rests.

Finally, it is contended on behalf of the relator that the right to hold over does not exist in the present case because the office in question is of legislative creation, and in support of this contention that part of section 2, article 15, of the constitution is appealed to, which declares that "the general assembly shall not create any office the tenure of which shall be longer than four years."

It is said that a construction which extends the right to hold after the expiration of a four years' term to an office of legislative creation is a practical abrogation of that part of the constitution above set out. This contention rests upon a critical analysis of the word "tenure," which comes from the Latin *tenere*, to hold. The argument assumes that the meaning to be attributed to the word "tenure," as used above, is substantially such as to render any person incapacitated or ineligible to hold an office of legislative creation for a longer period than four years by any method, in virtue of one selection or election; hence, it is said, since the legislature can create no office which can be held for a longer period than four years, the respondent could not hold over, and the office in dispute necessarily became vacant, regardless of the constitutional provision under which officers are entitled to hold over in certain cases. We are not impressed with the view thus urged.

While we concede that the constitutional inhibition imposes an absolute restraint against the creation of a term of office by the legislature of longer duration than four years, and that it prohibits a legislative tenure, or right to hold by legislative authority, for a longer period than four years by virtue of one election or appointment, it by no means follows that the constitutional provision under which offices of legislative creation may be held after the expiration of the term fixed, and until a successor is elected and qualified, is rendered inoperative. The right to hold over is derived from the same constitution that imposes the limitation upon the general assembly. The constitutional provision which adds to the fixed term a contingent right to hold over until a successor shall have been elected and qualified applies in express terms to officers "provided in this constitution or in any law which may be hereafter passed."

To sustain the view contended for would require us, upon the mere construction or definition of a word,—and a definition which in our view does not lead to the conclusion claimed,—to entirely read out of or materially modify all that part of section 3, article 15, of the constitution which has reference to the holding over of officers who are incumbents in offices created by the general assembly.

The obvious purpose of the framers of the constitution was to inhibit the right of the general assembly to create any office to which, by its authority, a tenure or right to hold for a longer period than four years might be fixed. But their purpose to prevent vacancies in office is equally apparent in respect to offices of legislative creation as in regard to those provided for in the constitution. The result is, that the constitution permits a legislative tenure for a fixed term not longer than four years, and if, at the end of that period, owing to the failure of the body charged with the duty of supplying the office by election, or for any other cause, no successor has been elected and qualified, the incumbent holds over by the paramount right of tenure which the constitution supplies, until he is superseded by a duly qualified successor who shall have been elected in the manner provided by law. After the expiration of the term fixed by the general assembly, the tenure or title of the officer is not under or by legislative approbation or authority, but by the continuing and superior authority and approbation of the constitution. Thus, as we have seen, it becomes the duty of the legislature, under the act creating the office in dispute, to supply it by quadrennial elections for terms of four years each; but to prevent the possibility of a vacancy occurring, except by death, resignation, or like casualty, the constitution stands a continuous and perpetual source of supply, by the authority of which the incumbent holds over until the body authorized to elect furnishes a duly elected and qualified successor. The failure of that body to elect at the time when by law it should have made the election cannot create a vacancy in the office. The conclusion follows that, under and by the very terms of the constitution, the respondent was occupying the office as an officer *de facto* and *de jure* at the time the relator was appointed and commissioned, and because he was thus occupying, there was no vacancy, and hence no power in the executive to appoint.

Having reached the conclusion that there was no vacancy, it is manifestly not important that we should consider whether

or not the governor had power to appoint in case a vacancy had arisen during the session of the legislature.

The judgment is affirmed, with costs.

NO VACANCY OCCURS IN OFFICE, where officer holds under appointment of senate for definite term and until successor is elected and qualified, if at expiration of his term the senate fails to elect a successor: See *State* v. *Howe*, 18 Am. Rep. 321.

LOUISVILLE, N. A., & C. R'Y CO. *v.* FLANAGAN.

[113 INDIANA, 483.]

COMMON CARRIER IS NOT LIABLE FOR FAILURE TO TRANSPORT GOODS or furnish cars therefor, unless the goods are offered at a regular depot, or other usual or designated place for receiving freight.

TO MAINTAIN ACTION AGAINST RAILROAD COMPANY FOR REFUSAL TO TRANSPORT FREIGHT, the refusal of the company, upon demand, to furnish cars for transporting articles placed at a station on its line, relieves the owner from making any further delivery or offer to deliver to the company.

PERSON CONTRACTING WITH RAILROAD COMPANY FOR TRANSPORTATION of goods, and making delivery of them to the company, may rely upon the fulfillment of the contract until it is repudiated and he is notified by the company to that effect, within a reasonable time; and for injury to the goods by delay, either in transportation or notification, he may recover damages.

CONTRACT OF RAILROAD COMPANY BEFORE COMPLETION OF ITS LINE, for carriage of freight, cannot be claimed by the company to be *ultra vires*, where it has been so far executed that the company has received the benefits thereof, which benefits it continues to retain.

FORM OF SPECIAL VERDICT is largely matter of discretion on part of court, and refusal to strike out parts thereof, on the ground that they embrace nothing more than conclusions of law, is not available as error on appeal.

ACTION against common carrier for violation of certain contract.

G. W. Easley, G. W. Friedley, G. R. Eldridge, S. O. Bayless, and W. H. Russell, for the appellant.

F. M. Trissal, for the appellees.

By Court, MITCHELL, C. J. Samantha A. and James W. Flanagan, partners doing business under the firm name of S. A. Flanagan & Co., commenced this suit against the appellant railway company to recover damages for the alleged violation of certain contracts which the plaintiffs charge were duly entered into between the parties to this action.

The complaint consisted of three paragraphs. In the first it is alleged that in the month of October, 1882, the plaintiffs were the owners of a manufacturing establishment and machinery for the manufacture of staves and heading, located at Fisher's Station, on the line of the Wabash railway, and that, on the above-mentioned date, the defendant agreed with them that if they would move their establishment to the town of Sheridan, on the line of its railway, it would carry staves and heading for them as cheap as the Wabash or Big Four roads, which were competing lines for the shipment of freight to the city of Indianapolis. It is also alleged that the defendant company agreed that it would be ready to receive and transport all staves or heading which the plaintiffs might furnish at points on the line of its road by the 15th of November, 1882. The complaint further charges that, relying on this agreement, the plaintiffs moved their factory and machinery to Sheridan, and commenced manufacturing staves and heading in October, 1882; that from November 15, 1882, until March 26, 1883, the plaintiffs had on the line of the defendant's railway at Sheridan staves and heading of the aggregate value of fifteen thousand dollars, which they were willing and anxious to have the defendant receive and transport, and for the transportation of which they demanded cars, which the defendant neglected and refused to supply. This paragraph avers that the plaintiffs were damaged in a large sum for the cost of ricking and insuring the staves and heading, and for the depreciation in value of their property, which was caused by checking, cracking, and mildewing, and for interest on the money invested.

The second paragraph alleged that the defendant, in a certain writing which is set out, proposed to the plaintiffs to carry such freight and property as they were engaged in manufacturing and handling, at a stipulated price per hundred weight, upon which price the company agreed to pay a rebate of two cents per hundred, in case the plaintiffs transported, or furnished for transportation, to Indianapolis, one hundred car-loads within a designated period. It was averred that the plaintiffs accepted the proposal so made, and delivered for transportation to Indianapolis, over the defendant's line, more than the designated number of car-loads within the time limited, and that they paid the freight at the price agreed upon, but that the defendant refused to pay the two cents per hun-

dred rebate, which the plaintiffs alleged amounted to one thousand dollars.

The facts set up in the third paragraph involve substantially the same principles as are involved in the second.

There was a verdict and judgment for the plaintiffs below.

On behalf of the railway company, it is now contended that the first paragraph of the complaint does not state facts sufficient, and that the demurrer thereto should have been sustained, because, it is said, there is nothing in this paragraph to show any delivery, or any offer to deliver, any goods whatever to the railroad company for transportation.

It is undoubtedly true that a carrier is not liable for failing to furnish cars, and for not transporting goods, unless goods are offered at a regular depot, or other usual or designated place for receiving freight: 3 Wood's Railway Law, 1580.

The averment in the first paragraph of the complaint is, in substance, that the plaintiffs had staves and heading of the value of fifteen thousand dollars on the line of defendant's road at the town of Sheridan, which they were willing and anxious to have the defendant receive and transport, and that they often demanded of it during the time the goods were so on its line that it furnish cars and transport the staves and heading according to its contract, which it wholly neglected and refused to do.

Within the ruling in *Louisville etc. R'y Co.* v. *Godman*, 104 Ind. 490, the refusal of the company upon demand to furnish cars for the transportation of goods, such as those described, which are alleged to have been placed at a station upon its line to be transported, relieved the plaintiffs from making any further delivery, or offer to deliver.

All that can be done by the owner of goods of the character and quantity of those described, which are designed for transportation, is to place them contiguous to the railway company's track at some usual or properly designated place, and request the company to furnish cars and receive the goods.

It is objected that the second paragraph of the complaint is defective, in that it is not alleged therein that the plaintiffs notified the railway company of their acceptance of its proposition to carry freight and pay a rebate, as in the second paragraph stated.

Further objection is made to this paragraph on the ground that it does not allege that the 150 car-loads therein alleged to

have been delivered for transportation by the plaintiffs were so transported in pursuance of the contract declared upon. It is urged, moreover, that the contract relied upon is invalid for want of mutuality, in that the plaintiffs came under no obligation to transport their goods by the defendant's line. The contract, it is contended, merely gave them the option to have their freight transported, without binding them to anything.

The paragraph is not so definite and certain in the respects referred to as the rules of good pleading would commend. It is averred, however, that the "plaintiffs contracted with the defendant," and that the terms of the contract are set forth in a certain letter written on behalf of defendant to the plaintiffs. Whatever was necessary, therefore, in the way of accepting and giving notice of the acceptance of the terms proposed in the letter, in order to complete the contract, must be presumed under the above averment to have taken place.

If the defendant had desired that the averment should be made more specific, so as to disclose more particularly what was done, a motion to that end would have been appropriate. So, it is alleged further in the complaint, that the plaintiffs "shipped" 150 car-loads of goods from Sheridan to Indianapolis during the period within which the contract stipulated that if one hundred car-loads should be transported a certain rebate was to be paid.

Although not averred in terms, the irresistible inference arises that the goods were transported under the contract.

It is quite true, as a general rule, that an offer of a bargain or proposition by one person to another, even though it be accepted by the other, is not enforceable as a contract unless the parties are mutually bound by corresponding obligations.

Thus in *Chicago etc. R. R. Co.* v. *Dane*, 43 N. Y. 240, which was an action to recover damages for the breach of an alleged contract to carry and transport a quantity of railroad iron from New York to Chicago, it appeared that the contract relied on consisted of a letter from the railroad company to the plaintiff, in which the company proposed to receive and transport a certain quantity of railroad iron to the place mentioned at a stipulated price. The proposition was accepted. In a suit against the railroad company for refusing to carry the iron according to the terms proposed, the court held that inasmuch as the plaintiff had not bound himself to furnish the iron for transportation, the contract was without consideration, and therefore invalid for want of mutuality: *Riggins* v. *Missouri*

River etc. R. R. Co., 73 Mo. 598; *Tilley* v. *County of Cook*, 103 U. S. 155.

The distinction between the present case and *Chicago etc. R. R. Co.* v. *Dane, supra*, is found in this: In the case cited the company refused to abide by the contract, or transport the iron, while in this the contract was fully executed in all respects, except that the company refuses to pay the rebate agreed upon. The present case is therefore within the rule which declares that if a contract, although not originally binding for want of mutuality, be nevertheless executed by the party not originally bound, so that the party asserting the invalidity of the contract has actually received the benefit contracted for, the latter will be estopped from refusing performance on his part on the ground that the contract was not originally binding on the other, who has performed: *Tucker* v. *Tucker*, 113 Ind. 272; *Laboyteaux* v. *Swigart*, 103 Id. 596; *Willetts* v. *Sun Mutual Ins. Co.*, 45 N. Y. 45.

It follows that there was no error in overruling the demurrer to the complaint.

After the evidence was heard, the plaintiffs below, having requested that the court require the jury to find a special verdict, submitted to the court the form of a verdict such as they claimed should be returned by the jury. The defendant objected to the form so submitted, and moved the court to strike out certain parts thereof, on the ground that, if returned, such parts would state nothing more than conclusions of law. This motion was overruled. Afterwards, the jury returned the special verdict so submitted to them as their verdict. The appellant objected to the receiving of the verdict, upon substantially the same grounds as those upon which its previous motion to strike out certain portions was predicated. This objection was also overruled, and the verdict was received and recorded. It is now argued with much elaboration that the court erred in its rulings on the above-mentioned motions.

It is, of course, proper for counsel to prepare and ask to have submitted to the jury such forms of a special verdict as in their judgment the evidence which has been heard justifies the jury in returning. Ordinarily, no careful or competent attorney would neglect so important a matter as this: *Pittsburgh etc. R'y Co.* v. *Ruby*, 38 Ind. 294; 10 Am. Rep. 111.

The degree of supervision which the court may exercise over the forms submitted must manifestly be left largely to its discretion, since it is the duty of the court to instruct the jury so

far as to enable them clearly to comprehend the matters in issue and the subjects to be covered by the special finding: *Louisville etc. R'y Co.* v. *Frawley*, 110 Ind. 18. The special findings should, of course, be limited to the case made by the pleadings, and should find all the facts without stating conclusions of law, but if findings are returned containing matters outside of the issues, or which are merely items of evidence or conclusions of law, such findings will be disregarded, and no one is harmed except the party on whose behalf such a finding was prepared. The conclusions of law, as stated by the court, must be supported by the facts found within the issues, and neither mere evidentiary facts nor conclusions of law stated by the jury will be of any avail: *Pittsburgh etc. R'y Co.* v. *Adams*, 105 Ind. 151.

Conceding all that is said concerning the impropriety and futility of the conclusions stated by the jury, which were in the nature of inferences of law, the appellant was, nevertheless, not harmed by the refusal of the court to strike them out, as requested in the several motions above: *Louisville etc. R'y Co.* v. *Frawley*, *supra*, and cases cited.

It is objected next that the court erred in overruling the appellant's motion for a *venire de novo*.

Eliminating from the special finding everything which can fairly be obnoxious to criticism, and it cannot be said to be so uncertain or ambiguous as that no judgment could properly have been rendered thereon. The special findings are full and complete, and they fully support a judgment covering the matters in issue.

Without a more particular reference to the evidence, we need only say it tends to support the plaintiffs' theory of the case, and was therefore sufficient to support the special finding of facts.

It is suggested that it appears from the evidence that the contract on which the first paragraph of the complaint is predicated was entered into before the appellant's line was completed. It is said that contracts entered into by railroad corporations before their lines are completed, for the transportation of freight after the completion of their lines, are *ultra vires*. We are aware of no authority which sustains this proposition.

Upon principle, it would seem that the power of a corporation to make such contracts as are promotive of its legitimate business, and which look to the advancement of the primary

purpose for which it was organized, should be liberally construed. The authorities support this view: Pierce on Railroads, 499; 1 Wood's Railway Law, sec. 169.

The principal purpose contemplated by the corporation in the construction of its line was, doubtless, the transportation of freight. It was, therefore, clearly within its power to make contracts, the object and effect of which would be to contribute to this purpose; and that the contract in question was made in anticipation that its line would be completed at a given date did not render it *ultra vires:* 1 Wood's Railway Law, secs. 179, 182. Besides, the contract having been fully executed by the plaintiffs, the corporation cannot, while retaining the benefit of it, assert that it had no power to make a contract the consideration of which it has received: *State Board etc.* v. *Citizens' Street R'y Co.*, 47 Ind. 407, and cases cited; *Chicago etc. R'y Co.* v. *Derkes*, 103 Id. 520.

The rule requiring the observance of good faith and fair dealing is as applicable to corporations as to individuals. Neither can involve others in onerous engagements, and with the consideration of the contract in their possession, disavow their acts, to the damage and discomfiture of others, unless it clearly appears that there was an absolute want of capacity to make the contract.

The appellant contends, further, that the plaintiffs were not justified in permitting their goods to await transportation by its line; but that it became their duty to transport their property by some other line of conveyance, and charge the appellant railway company with any difference in the cost of transportation thus incurred over what the cost would have been if the company had carried according to its agreement.

The plaintiffs having delivered their goods upon the defendant's line ready for transportation, they had a right to rely upon the fulfillment of the contract in pursuance of which they acted until it was repudiated, or until they were notified that the railway company could not, or did not intend to, transport their goods within a reasonable time: *Louisville etc. R'y Co.* v. *Sumner*, 106 Ind. 55; 55 Am. Rep. 719, and cases cited.

While it is true that one who is subject to injury from the breach of a contract must make reasonable exertions to reduce his damages as much as practicable, and not allow them to be unnecessarily enhanced by his own negligence or misconduct, there is no rule of law which requires one thus cir-

cumstanced to execute the contract, which the other party recognizes and claims the right to execute, and for the execution of which the party in default has equal facilities with the other.

We are not called upon in the present case to consider the rule for the measurement of damages in case of the failure of a carrier to transport goods within a reasonable time. We determine nothing further than that it was not competent for the appellant to show, under the circumstances as they appeared, that the plaintiffs might have conveyed their goods to the line of another railroad by which they might have been transported to Indianapolis. They were, to say the least, not bound to do this until they received notice of the refusal or inability of the appellant to execute its contract.

At the proper time the defendant below requested that a number of instructions, presented on its behalf, be given the jury. The refusal of the court to give the instructions asked is made the subject of discussion.

In view of the fact that a special finding had been requested, if it were conceded that the instructions refused stated the law correctly in the abstract, it would by no means follow that error had intervened on account of the refusal of the court to instruct the jury as requested.

The record discloses that the jury were adequately instructed in respect to all that was essential to enable them to return a special finding of the facts: *Indianapolis etc. R'y Co.* v. *Bush*, 101 Ind. 582; *Louisville etc. R'y Co.* v. *Frawley*, *supra*.

There are a number of other questions proposed suggestively in the appellant's brief. They are all disposed of by what has preceded.

Having found no error, the judgment is affirmed, with costs.

DUTY OF RAILROAD COMPANY TO RECEIVE AND CARRY GOODS: See *Ballentine* v. *North Mo. R. R. Co.*, 93 Am. Dec. 315, and note.

DELIVERY TO CARRIER, SUFFICIENCY OF: See note to *Montgomery & E. R'y Co.* v. *Kolb*, 49 Am. Rep. 54.

CASES

IN THE

SUPREME COURT

OF

ALABAMA.

AMOS *v.* STATE.

[83 ALABAMA, 1.]

CRIMINAL LAW — EVIDENCE. — ALL CONFESSIONS ARE PRIMA FACIE INVOLUNTARY and inadmissible, and can be rendered admissible only by showing that they are voluntary, and not constrained.

EVIDENCE — ACTS OF CO-CONSPIRATORS. — Where three persons were present when the deceased came to his death by violence, inflicted by one or more of them, the others aiding, encouraging, or giving countenance to the deed, or ready to assist if necessary, whether present for the purpose by preconcert, or entering into the common illegal purpose at the time, all are equally guilty, and the acts of each may be proved against all, or any number of them; and the existence of such preconcert, conspiracy, or common purpose, is for the jury to determine.

CRIMINAL LAW — CHARGING JURY AS TO MURDER IN FIRST DEGREE. — It is not error to charge the jury that the four elements necessary to constitute murder in the first degree under the Alabama statute (Code, sec. 4295) are all embraced in the words "formed design," but it is better to charge in the language of the statute.

INDICTMENT for murder, charging that Rube Amos, Bud Amos, and Tobe Amos "unlawfully, and with malice aforethought, killed William Fuller, by striking him with an ax," or (second count) "by stabbing him with a knife," or (third count) "by striking him with an ax, and cutting and stabbing him with knives." Bud and Tobe Amos were tried, and convicted of murder in the second degree. A witness testified on the trial that the three brothers Amos were present when the deceased came to his death; that Tobe Amos struck the deceased, and cut him several times in the arm and leg; that Bud Amos struck him in the head with a short-handled ax;

and that Rube Amos held one of his arms, and cut him with a knife in the leg. The nature and tendency of other testimony elicited on the trial is fully presented in the opinion. The defendants asked the following charges: 10. "Before the jury can convict the defendants, they must be satisfied from the evidence, beyond a reasonable doubt, that they killed or helped to kill Fuller by an ax or a knife, or an ax and knives; and if there is such conflict in the evidence as to an ax being used by Bud Amos as to raise a reasonable doubt in the minds of the jury as to whether he used an ax; and if they are not satisfied beyond a reasonable doubt that he used a knife, and there was no conspiracy between the three Amos boys,—then they must acquit Bud Amos." 11. "Before the jury can convict the defendants, they must be satisfied from the evidence, beyond all reasonable doubt, that they killed the deceased, or helped to kill him, with an ax or a knife, or an ax and knives; and if, from the evidence, there are such circumstances as to refute and contradict the fact that Tobe Amos, on the occasion of the killing, used a knife; and if they are satisfied that Tobe Amos never used an ax, and that there was no conspiracy,—then they must acquit said Tobe Amos." 14. "Before the jury can convict the defendants, the proof must exclude every other hypothesis but that of their guilt." Each of these charges was refused, and the defendants excepted.

Dobbs and Howard, for the appellants.

Thomas N. McClellan, attorney-general, for the state.

By Court, STONE, C. J. The defendants were tried on an indictment charging them with murder, and they were convicted of that offense in the second degree. Several witnesses testified to confessions made by the different defendants. Among them was one Ferguson, who aided in arresting them. The confession of which he gave testimony was made while the prisoners were in custody. He was asked, "What did defendant Tobe Amos say about participating in the killing of William Fuller?" His answer tended to criminate him. There was objection and exception alike to the question and the answer. The record is silent as to what caused this confession or called it out. Inducements or fear may have preceded the confession, and there is nothing in the record to show that they were not brought to bear upon him. It has been too

long the rule of this court to be now disputed or questioned, that "all confessions are *prima facie* involuntary and inadmissible, and they can be rendered admissible only by showing that they are voluntary, and not constrained": *Sampson* v. *State*, 54 Ala. 241; *Young* v. *State*, 68 Id. 569; 3 Brickell's Digest, p. 285, secs. 552 et seq. The same objection applies to confessions proved by other witnesses. This error must work a reversal of this case.

There was testimony tending to show that the deceased came to his death by violence inflicted by one or more of the brothers Amos, and that the three were present, aiding, encouraging, or giving countenance to the deed. Whether in fact the violence was done by one, or more than one, whether they went there with a common purpose to do violence, or to see it done, or to aid or encourage the doing of it, or to lend assistance should it become necessary,—each and all of these were proper inquiries for the jury, and the testimony justified their submission to that body. So if, being present without preconcert, they entered into a common illegal purpose, and one or more of them did the deed of violence, and the others were present, aiding, abetting, encouraging, sanctioning, or giving countenance to the unlawful act, or ready to lend assistance if it should become necessary, and the jury, by the proper measure of proof, find either one of these categories to be true, then, if the actor or actors be found guilty, the others are also guilty. Hence it is that, when there is testimony sufficient in the opinion of the presiding judge to show a *prima facie* case of conspiracy, or community of purpose, then the acts of each may be proved on the trial against all or any number of the alleged conspirators; and if the jury find that there was such conspiracy, or common purpose, then the act of each participant, done or sanctioned by one in aid of the common purpose, becomes the act of all in its criminating effect: *McAnally* v. *State*, 74 Ala. 9; *Jordan* v. *State*, 79 Id. 9; *Williams* v. *State*, 81 Id. 1; 60 Am. Rep. 133; *Hughes* v. *State*, 75 Ala. 31; *Phœnix Ins. Co.* v. *Moog*, 78 Id. 284; 56 Am. Rep. 31.

Under the rules above declared, we do not find the trial court committed any error in the rulings on testimony, except the single one in regard to confessions. And under these rules, charges 10 and 11 asked were too narrow, were misleading, and should not have been given. Charge 14 asked by defendants is not adapted to the case made out by the testimony, is not precisely accurate, and would be very apt to confuse and

mislead an ordinary jury. "Reasonable" should precede the word "hypothesis." It was rightly refused.

In the general charge, the court instructed the jury that the four elements necessary to constitute murder in the first degree are all embraced in the words "formed design." We are not prepared to say that there is error in this: *Mitchell* v. *State*, 60 Ala. 26. It would be better, however, to charge in the language of the statute: *Floyd* v. *State*, 82 Id. 16.

The circuit court did not err in refusing a change of venue.

The questions raised on the drawing, summoning, and impaneling the jury will not again arise in the form presented in this record, and we will not consider them.

Reversed and remanded.

CONFESSIONS, WHEN ADMISSIBLE AS VOLUNTARY: *People* v. *Barker*, 1 Am. St. Rep. 501, and cases collected in note 526; obtained by decoy, are admissible: *Heldt* v. *State*, 57 Am. Rep. 835, but compare note 839.

CONSPIRACY, EVIDENCE OF, may be proved by circumstantial evidence: *Kelley* v. *People*, 14 Am. Rep. 342; acts and declarations of one conspirator as evidence against the others: *People* v. *Vernon*, 95 Am. Dec. 49, and note 56; *Commonwealth* v. *Timon*, 69 Id. 248; *Johnson* v. *State*, 65 Id. 383.

BROWN *v.* STATE.

[83 ALABAMA, 33.]

CRIMINAL LAW. — TO SUSTAIN PLEA OF SELF-DEFENSE in case of homicide, there must be shown a present pressing necessity, real or apparent, to protect the life of the defendant, or his person from great bodily harm; he must not be the aggressor nor provoke nor encourage the rencontre; and he must retreat from the combat, if there be a mode of escape consistent with his safety. A charge asked which omits either of these requisites to a sufficient hypothesis may be properly refused.

SAME — SELF-DEFENSE — BURDEN OF PROOF. — USE OF DEADLY WEAPON RAISES PRESUMPTION OF MALICE, and casts on the defendant the burden of repelling such presumption, when it is not rebutted or overcome by the evidence which proves the killing. The *onus* to prove a present pressing necessity, real or apparent, to take life is on the defendant; but when he shows this, the prosecution may avoid the effect by proving that the defendant was at fault in bringing on the difficulty, or could have reasonably escaped. The prosecution holds the affirmative of these negative propositions of the plea of self-defense.

DEFENDANT, Brown, was indicted for the murder of one Jordan, and, on a second trial, was convicted of manslaughter in the first degree. As shown by the bill of exceptions, the defendant had instituted a prosecution for trespass against Jordan and his two sons, and the case was on trial in the

office of a justice of the peace. The defendant had been examined as a witness, and was signing his name to his testimony, holding the paper on a board in his lap, when Jordan made a remark to the effect that he had sworn to a lie; whereupon the defendant struck Jordan over the head with the board, breaking it into pieces. Jordan, who was a stronger man than the defendant, then knocked or threw the latter down; the defendant then drew his pistol and fired two shots at Jordan, one while he was down and the second as he was rising. The first shot struck the deceased, causing his death a few days afterwards. The parties had been on bad terms, and threats had been made by each against the other. A witness testified that he had advised the deceased to let Brown alone, and further testified to the following declarations made to him by the deceased on the evening before his death: "I ought to have taken your advice, but I would have got him, anyhow, if he had not been too quick for me." These were admitted as dying declarations. The first charge of the court to the jury, at the instance of the state, was as follows: "To make out a case of justifiable self-defense, the evidence must show that the difficulty was not provoked or encouraged by the defendant, and that the defendant was, or appeared to be, so menaced at the time as to create a reasonable apprehension of danger to his life, or of grievous bodily harm, and that there was no other reasonable hope of escape from such present impending peril." The defendant excepted. The following charges requested by the defendant were refused, and the defendant excepted: 1. "If the jury believe from the evidence that, at the time of the killing, the defendant entertained an honest belief in the existence of a present necessity on his part to kill, in order to save his own life, or to prevent the infliction of grievous bodily harm, and the circumstances at the time were such as to impress the mind of a reasonable man, under the same state of facts, with a belief of such imminent peril and urgent necessity, and if they further believe from the evidence that the defendant did not bring on the difficulty, nor provoke it, then they must find the defendant not guilty"; 2. "If the jury believe from the dying declarations of the deceased, taken in connection with all the other testimony in the case, that it was the intention of the deceased to bring on the difficulty, and take the life of Brown, or do him great bodily harm, and that he did bring on the difficulty, and was only prevented from carrying such intention into execution by Brown being

too quick for him, then they must find the defendant not guilty."

W. S. Anderson, for the appellant.

Thomas N. McClellan, attorney-general, for the state.

By Court, CLOPTON, J. To successfully invoke the plea of self-defense, there must exist a present, pressing necessity to protect the life of the slayer, or his person from great bodily harm, or the circumstances must be such as would create in the mind of a reasonable, prudent man the honest belief of such necessity, though it may not be real; the slayer must not be the aggressor, nor provoke nor encourage the rencontre; and he must retire from the combat, if there be a mode of escape which will not endanger his safety. Mere pursuit, without intent and capacity, or seeming capacity, to take life, or inflict great bodily harm, is not sufficient. Though it is not necessary that the slain should in fact have the means at hand, his conduct and acts must be of a character to impress the mind that such is his purpose, and that he has the ability to accomplish it. The slayer may act on reasonable appearance. We have uniformly held that a charge may be properly refused which omits either of these requisites to a sufficient hypothesis, unless no inference can be reasonably drawn from the evidence that the defendant was at fault in bringing on the difficulty, or that retreat would endanger his safety: *Jordan* v. *State*, 81 Ala. 32; *Tesney* v. *State*, 77 Id. 33; *De Arman* v. *State*, 71 Id. 351; *Storey* v. *State*, 71 Id. 329. The charges requested by defendant are faulty, in that the hypothesis ignores any other reasonable mode of escape.

The use of a deadly weapon, creating the presumption of malice, shifts on the defendant the burden of repelling such presumption, when it is not rebutted or overcome by the evidence which proves the killing. The *onus* to prove a present pressing necessity, real or apparent, to take life is on the defendant. But when he shows this, the prosecution may avoid its effect by proving that the defendant was at fault in bringing on the difficulty, or could have reasonably escaped. The state holds the affirmative of these negative propositions of the plea of self-defense: *Hadley* v. *State*, 55 Ala. 31; *De Arman* v. *State*, *supra*. The first charge given by the court at the instance of the state is substantially in the language of the charge in *McDaniel* v. *State*, 76 Id. 1, which was held to

be erroneous, for the reason that it made a condition of acquittal that "the evidence must show that the difficulty was not provoked or encouraged by the defendant"; and that such provocation or encouragement not being presumed, and disproof not being required, except in rebuttal of the evidence thereof which the state might introduce, the charge misplaced the burden of proof. In *Watson* v. *State*, 82 Id. 10, it was not intended to overrule this express decision. The opinion in the latter case responded to the only specific objection made to the charge, without considering others which were not presented, and not necessary to be considered, as the judgment was reversed on other grounds.

As the defendant, on the plea of former acquittal being filed, cannot be retried for murder, it is unnecessary to consider the charges relating to that offense.

Reversed and remanded.

SELF-DEFENSE. — DUTY OF PERSON ASSAILED TO RETREAT IS IMPERATIVE, if he can do so with safety: *State* v. *Donnelly*, 58 Am. Rep. 234; and compare *State* v. *Partlow*, 59 Id. 31; *Runyan* v. *State*, 26 Id. 52; *Erwin* v. *State*, 23 Id. 733.

SELF-DEFENSE, WHAT IS AND WHAT IS NOT, and facts essential to maintain: *State* v. *Shippey*, 88 Am. Dec. 70, and note 75; *State* v. *Benham*, 92 Id. 417; *Patten* v. *People*, 100 Id. 173, and note 181; *Wise* v. *State*, 85 Id. 595; *Roes* v. *State*, 38 Am. Rep. 643; *Bohannon* v. *Commonwealth*, 8 Id. 474.

SELF-DEFENSE — BURDEN OF PROOF: *State* v. *Patterson*, 12 Am. Rep. 200; *Mitchell* v. *State*, 68 Am. Dec. 493; *Goodall* v. *State*, 80 Id. 396.

COOK *v.* STATE.

[63 ALABAMA, 62.]

CRIMINAL LAW — ARSON. — Phrase "corn-crib containing corn," used in an indictment for arson, includes a "corn-pen containing corn," as the latter words are used in the Alabama statute (Sess. Acts 1885, p. 105) defining arson in the second degree, and the burning is arson in the second degree.

SAME — WHAT BUILDINGS ARE WITHIN CURTILAGE OF DWELLING-HOUSE. — CURTILAGE USUALLY INCLUDES yard, garden, or field which is near to and used in connection with the dwelling. Many cases arise in which it can be affirmed, as matter of law, that a given house or structure is or is not within the curtilage; but where the testimony is indeterminate in character, the question is properly submitted to the jury.

INDICTMENT for arson. The opinion states the case.

Judge and De Graffenreid, for the appellant.

Thomas N. McClellan, *attorney-general*, for the state.

By Court, STONE, C. J. The defendant was indicted for arson, under the statute amendatory of section 4347 of the Code of 1876, approved January 30, 1885: Sess. Acts, 105; Code of 1886, sec. 3781. The indictment contains two counts. The first charges that the defendant "willfully set fire to or burned a corn-crib containing corn," property of Ellis Outlin. The second count charges that he "willfully set fire to or burned a barn (property of Ellis Outlin), said barn being within the curtilage of the dwelling-house of said Ellis Outlin." There was demurrer to the indictment, assuming that it charged a misdemeanor in the first count, and a felony in the second. The demurrer was overruled.

The statute we are considering enumerates many criminal acts, grouping them into classes, and pronounces each of them to be arson in the second degree, and a felony. Among the groupings are the following: "To set fire to or burn . . . . any car, train of cars, car-shed, cotton-house, or cotton-pen containing cotton, or corn-pen containing corn." Another grouping is expressed as follows: "Or barn, stable, shop, or office of another person, within the curtilage of a dwelling-house." The argument in support of the demurrer is, that the statute specifies "corn-pen containing corn" as the offense it denounces and punishes as arson in the second degree, while the indictment is for "setting fire to or burning a corn-crib containing corn." On this ground, it is claimed that the burning of a "corn-crib containing corn" falls within the residuary clause in reference to the crime of arson, and is only arson in the third degree,—a misdemeanor: Code of 1886, sec. 3784. The phrase "corn-crib" is not found in the act of January 30, 1885. We hold that when the offense in this case was committed, the terms "corn-pen containing corn" and "corn-crib containing corn" had substantially the same popular signification, or, at least, that the phrase "corn-crib containing corn" included corn-pen containing corn. Each of the counts charges a felony: *Sparrenberger* v. *State*, 53 Ala. 481; 25 Am. Rep. 643; *Block* v. *State*, 66 Ala. 493; *Washington* v. *State*, 68 Id. 85. The Code of 1886, sec. 3781, has embodied "corn-crib" in its provisions, and has made the willful burning, or setting fire to it, arson in the second degree; and that, whether it contains corn or not. That provision has nothing to do with this case, as the offense here prosecuted was committed before it became a law. The demurrer was rightly overruled.

2. The defendant asked the court to charge the jury that, if they believed the evidence, they could not convict the defendant under the second count in the indictment. This charge was refused, and the conviction was had on the second count. The theory of the charge, and the only ground on which it is or can be based, is, that, as a matter of law, the testimony fails to show that the barn charged to have been burned was within the curtilage of the dwelling-house.

Many cases may and do arise in which it can be affirmed, as matter of law, that a given house or structure is or is not within the curtilage. Curtilage usually includes "the yard, or garden, or field, which is near to and used in connection with the dwelling": *Ivey* v. *State*, 61 Ala. 58. And Bishop (Statutory Crimes, sec. 278), quoting from ancient authors, says: "The privy, barn, stable, cow-houses, dairy-houses, if they are parcel of the messuage, though they are not under the same roof, or joining or contiguous to it," are included within the curtilage: See 2 Bishop's Crim. Law, 7th ed., secs. 104 et seq.; 1 Id., 4th ed., sec. 302, and note 4; 1 Wharton's Crim. Law, 9th ed., sec. 834; 4 Bla. Com. 274; *Overstreet* v. *State*, 46 Ala. 30; *Washington* v. *State*, 82 Id. 31.

We hold that the testimony in this case was of that indeterminate character which should have been passed on by the jury, and the circuit court did not err in refusing to instruct them that, as matter of law, the barn was not within the curtilage: *Commonwealth* v. *Barney*, 10 Cush. 480; *State* v. *Shaw*, 31 Me. 523; *People* v. *Taylor*, 2 Mich. 250; *People* v. *Gedney*, 10 Hun, 151.

Affirmed.

ARSON, BURNING OF WHAT PROPERTY CONSTITUTES: *Mary* v. *State*, 81 Am. Dec. 60, and note 67; *State* v. *Toole*, 76 Id. 602; *Luke* v. *State*, 20 Ala. 269, and note 271; *Jenkins* v. *State*, 21 Id. 255, and note 257.

CURTILAGE OF DWELLING, WHAT IS WITHIN: *Mary* v. *State*, 81 Am. Dec. 60, and note 68; *State* v. *Toole*, 76 Id. 606, note.

INDICTMENT FOR ARSON, CHARGING AS SINGLE ACT BURNING OF SEVERAL HOUSES, is not bad for duplicity: *Woodford* v. *People*, 20 Am. Rep. 464.

BLACK v. STATE.

[83 ALABAMA, 81.]

CRIMINAL LAW — LARCENY. — ELECTION WILL NOT BE COMPELLED where the indictment does not designate a particular act, and there is evidence on the part of the prosecution tending to show more than one act; but when the indictment is so framed as to be adapted to the different phases which the evidence may present of a single transaction particularly charged, an election will be enforced. The principle of election is applicable only when there is evidence of seperate and distinct transactions.

SAME. — STRONG PRESUMPTION ARISES, ON PROSECUTION FOR LARCENY, THAT THERE WAS NO FELONIOUS INTENT, if the taking was open and notorious, and there was no subsequent attempt to conceal the property, and no denial, but an avowal of the taking; and this presumption must be repelled by clear and convincing evidence before a conviction is authorized.

SAME — REASONABLE DOUBT AS TO OWNERSHIP OF PROPERTY ALLEGED TO BE STOLEN. — If, looking at all the evidence, on a prosecution for the larceny of a hog, alleged to be the property of a person whose name is to the grand jury unknown, there exists a reasonable doubt whether the animal found in the defendant's possession belonged to himself or to some other person, this will entitle the defendant to an acquittal.

INDICTMENT containing a single count, and charging the defendant with the larceny of a hog, "the personal property of some person whose name is to the grand jury unknown." On the trial, the prosecution introduced one Roach as a witness, who gave testimony tending to show that the hog belonged to him. The testimony of one Matthews, another witness for the prosecution, tended to show that he owned the hog. The defendant asked the court to exclude from the jury all that the last witness had said "about his hog, or the loss thereof," and the motion being overruled, he then moved the court to "require the state to elect as to which hog — that of Roach or that of Matthews — a conviction would be asked," which motion was also overruled, and the defendant excepted to each ruling. A witness for the defense testified that he had given the defendant leave to kill some of his hogs running at large in the swamp; and there was evidence tending to show that the killing was done openly, and that the defendant made no attempt at concealment. A charge requested by the defendant was as follows: "If, after looking at all the evidence, it is left in doubt whether the hog found in the defendant's possession, and which he is charged with stealing, was the property of himself, or of some other person, this leaves in doubt a material allegation of the indictment, and the defendant is

entitled to the benefit of this doubt, and would be entitled to an acquittal." The request was refused, and the defendant excepted.

N. Stallworth, and Watts and Son, for the appellant.

Thomas N. McClellan, attorney-general, for the state.

By Court, CLOPTON, J. The defendant insists that the state by introducing evidence tending to show that the hog charged to have been stolen belonged to the witness Roach, elected to proceed for larceny of the property of Roach, and could not afterwards offer evidence tending to show that it belonged to another person. When an indictment does not designate a particular act, and there is evidence showing more than one act, the prosecutor will be compelled to elect the particular offense for which he will proceed; but the principle of election is applicable only when there is evidence of separate and distinct transactions. An election will not be enforced when the indictment is so framed as to be adapted to the different phases which the evidence may present of a single transaction. The indictment avers that the owner is unknown, and the state did not attempt to prove more than one act. In such case, the state ought not to be compelled to elect as to the mere fact of ownership. No prejudice could result to the defendant from evidence that one or the other of two persons was the owner. The record does not present a case for election: *Smith* v. *State*, 52 Ala. 384.

The charge requested by defendant, that if the taking was open and notorious, and there was no subsequent attempt to conceal the property, and no denial, but an avowal of the taking, a strong presumption arises that there was no felonious intent, which must be repelled by clear and convincing evidence before a conviction is authorized, is substantially in the language of the rule as declared in *McMullen* v. *State*, 53 Ala. 531, and should have been given: *Rountree* v. *State*, 58 Id. 383; *Johnson* v. *State*, 73 Id. 523.

Before a conviction can be had in a criminal case, all the essential constituents of the offense must be proved beyond a reasonable doubt. Generally, larceny is the taking the possession and carrying away the goods of another, with the felonious intent to convert them to the use of the taker or of some other person. There are exceptional cases, in which the owner may be guilty of stealing his own goods, but this case does not come within the exceptions. Under the circumstances of

this case, if the hog was the property of the defendant, there could have been no larceny. If the evidence left in doubt whether the hog was his property, or the property of some other person, the state failed to establish, beyond a reasonable doubt, the guilt of the defendant. The court erred in refusing to give the instruction requested by defendant in regard to such doubt.

Reversed and remanded.

LARCENY, POSSESSION AS EVIDENCE: *Lehmann* v. *State*, 51 Am. Rep. 298; *People* v. *Hurley*, 44 Id. 55; *Hunt* v. *Commonwealth*, 70 Am. Dec. 443, and note 447; *Jones* v. *State*, 64 Id. 175; *Garcia* v. *State*, 82 Id. 605; *State* v. *Johnson*, 86 Id. 434; *Belote* v. *State*, 72 Id. 163; *State* v. *Wohlman*, 86 Id. 117.

LARCENY — OWNERSHIP OF PROPERTY, PROOF OF: *People* v. *Bennett*, 93 Am. Dec. 551, and note 559.

DEFENDANT IN INDICTMENT FOR LARCENY SHOULD BE ACQUITTED if the testimony leaves in doubt the intent with which the property was taken: *Billard* v. *State*, 94 Am. Dec. 317, and note 322.

INDICTMENT, ELECTION BETWEEN DIFFERENT COUNTS IN, WHEN ORDERED: *State* v. *Bell*, 92 Am. Dec. 658, and extended note 660.

BREWER *v.* STATE.

[83 ALABAMA, 113.]

EMBEZZLEMENT BY AGENT OR SERVANT. — A mail-rider in the service of the United States government who purloins the money from a registered letter in a mail-bag is not the agent or servant of the person who sent the letter, within the terms of the Alabama Statute, Code of 1886, section 3795, punishing embezzlement by an agent or servant. The term "agent" or "servant," as used in the statute, imports the correlative idea of a principal or master, and implies an employment by virtue of which the money or property came into his possession.

INDICTMENT for the embezzlement of money. The opinion states the case.

J. J. Altman, for the appellant.

Thomas N. McClellan, attorney-general, for the state.

By Court, SOMERVILLE, J. The record shows that the defendant was convicted of embezzling money which was alleged to have come into his possession by virtue of his employment as agent or servant of one Rainer, which is made punishable by the statute as if he had stolen it: Code of 1886, sec. 3795. This conviction was under the third count of the indictment, which operated, under our practice, as an acquit-

tal under all the other counts of the indictment. We confine ourselves, therefore, to a consideration of the charge made in this single count.

The evidence showed that, in September, 1886, Rainer had sent the sum of $395 in a registered letter, from a post-office in Choctaw County, to Cuba station, another post-office, in Sumter County, through the mail service of the United States government. The defendant was the mail-rider between these two points, and the evidence tends to prove that, while thus engaged, he appropriated the money by fraudulently converting it to his own use.

In our opinion, the defendant, under these circumstances, was not the agent or servant of Rainer, who could in no sense be said to be his principal or employer. He was not in the service of Rainer, but of the United States government, from which he received his appointment, and by whose official authorities only he was liable to be removed or deposed. The term "agent" or "servant." as used in the statute, imports the correlative idea of a principal or master, and "implies employment — service, delegated authority — to do something in the name or stead of the principal, an employment by virtue of which the money or property came into his possession": *Pullam* v. *State*, 78 Ala. 31; 56 Am. Rep. 21; Code of 1886, sec. 3795; 2 Bishop's Crim. Law, 7th ed., 352–354.

The circuit court erred in not giving the charge requested by the defendant, to the effect that if the jury believed the evidence, they must find the defendant not guilty as to the third count in the indictment.

The rules of practice now requiring a former acquittal or conviction to be specially pleaded, we do not make an order in this court discharging the defendant, but reverse the judgment, and remand the cause, that the order may be made by the circuit court: Rule of Practice No. 31, 82 Ala. 8.

Reversed and remanded.

EMBEZZLEMENT, who is an agent within the meaning of the statute concerning: *Calkins* v. *State*, 98 Am. Dec. 140, note; *State* v. *Tabener*, 51 Am. Rep. 382.

HIRER OF DOMESTIC ANIMAL IS NOT WITHIN STATUTE OF EMBEZZLEMENT which covers "any private banker, commission merchant, factor, broker, attorney, bailee, or other agent": *Watson* v. *State*, 45 Am. Rep. 70.

EMBEZZLEMENT DISTINGUISHED FROM LARCENY: *Commonwealth* v. *Berry*, 96 Am. Dec. 767, and note 769; *Calkins* v. *State*, 98 Id. 126, 129, note.

SHERWOOD *v.* ALVIS.

[83 ALABAMA, 115.]

CONTRACT MADE BY OR WITH CORPORATION, IF BEYOND ITS CORPORATE POWER, is not enforceable, and the other party is not estopped from invoking the defense of *ultra vires;* but if the contract be within its corporate power, the other party is estopped from disputing the regular and complete organization of the corporation.

CONTRACT MADE BY FOREIGN CORPORATION IS NOT VOID, AND MAY BE ENFORCED, in Alabama, although it was entered into in disregard of the constitutional prohibition (Ala. Const., art. 14, sec. 4) declaring that no foreign corporation shall do any business in the state without having a resident agent and a known place of business; and the other party to the contract is estopped from pleading its invalidity on this account, after having received the benefits.

STATUTORY real action brought by Sherwood against Alvis and others, to recover the possession of certain lands, with damages for the detention. The material facts appear in the opinion.

Thorington and Smith, and O. Kyle, for the appellant.

John M. Chilton, contra.

By Court, STONE, C. J. The contract out of which the present litigation grew was made in Alabama. The New England Mortgage Security Company, a corporation organized under the laws of Connecticut, lent money to Alvis, and received from him a mortgage on real estate lying in Alabama, to secure the repayment of the loan.

The mortgage contained a power of sale on default. Under authority alleged to have been conferred by the corporation, it is claimed that an agent advertised and sold the land according to the requirements of the mortgage; that Sherwood became the purchaser, and received a conveyance in the name of the corporation, executed by the said agent, styling himself attorney in fact. Sherwood thereupon instituted this statutory real action to recover possession of said lands, together with damages for the detention. It is not shown that Sherwood is an outsider, purchasing in his own right, nor is there in the record any evidence tending to show the price at which he purchased, nor whether he paid the purchase-money. Plaintiff did not succeed in getting his title before the jury.

The main defense arose under certain special pleas, which averred that the New England Mortgage Security Company was a foreign corporation; that the loan was made and the

mortgage executed in Alabama; and that at the time the contract was made the said corporation had no known place of business in Alabama, and no agent or agents therein.

A demurrer to these pleas was overruled, and this presents the first question for our consideration. The constitutional prohibition relied on is in the following language: "No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein": Constitution of 1875, art. 14, sec. 4.

We have held, in a long list of decisions, that a contract made by or with a corporation which is outside of the pale of its corporate authority confers no rights, and that the making of such contract does not estop the party promising from invoking the defense of *ultra vires: Smith* v. *Alabama Life Ins. Co.*, 4 Ala. 558; *City Council* v. *M. & W. Plank-road Co.*, 31 Id. 76; *Waddill* v. *A. & T. R. R. Co.*, 35 Id. 323; *Grand Lodge of Alabama* v. *Waddill*, 36 Id. 313; *Chambers* v. *Falkner*, 65 Id. 448; *Wilks* v. *Ga. Pac. R. R. Co.*, 79 Id. 180; *Westinghouse Machine Co.* v. *Wilkinson*, 79 Id. 312. The contract we are considering, however, is not without the scope of the New England Mortgage Security Company's corporate powers. It is directly within the line of business for which that corporation was created.

On the other hand, following a well-established, uniform rule, we have declared that if a person contract with a corporation in a matter within its corporate power, the mere making of such contract estops the promisor from disputing the corporation's regular and complete organization: *Lehman* v. *Warner*, 61 Ala. 455. The distinction is between an entire absence of authority in the organic law itself and a failure to comply with some prerequisite which the law has made a condition precedent to the exercise of corporate functions. In the one case, there is a want of power to act; in the other, only an abuse of power conferred.

The case of *Smith* v. *Sheeley*, 12 Wall. 358, like the present suit, was an action for the recovery of a lot of land. One of the main questions considered and decided was, whether the Nehama Valley Bank could be lawful grantee of the lot which was the subject of the suit. While Nebraska was only a territory, its legislature had incorporated the bank, but the act of incorporation was never approved or confirmed by Congress. By act approved July 1, 1836, Congress enacted:

"That no act of the territorial legislature of any of the territories of the United States incorporating any bank, or any institution with banking powers or privileges, shall have any force or effect whatever until approved and confirmed by Congress." This act of Congress was in force when the territorial legislature incorporated the Nehama Valley Bank. The court, Mr. Justice Davis delivering its unanimous opinion, said: "It is insisted, however, as an additional ground of objection to this deed, that the bank was not a competent grantee to receive title. It is not denied that the bank was duly organized in pursuance of the provision of an act of the legislature of the territory of Nebraska; but it is said that it had no right to transact business until the charter creating it was approved by Congress. This is so, and it could not legally exercise its powers until this approval was obtained. But this defect in its constitution cannot be taken advantage of collaterally. No proposition is more thoroughly settled than this, and it is unnecessary to refer to authorities to support it. Conceding the bank to be guilty of usurpation, it was still a body corporate *de facto*, exercising at least one of the franchises which the legislature attempted to confer upon it; and in such a case a party who makes a sale of real estate to it is not in a condition to question its capacity to take the title after it has paid the consideration for the purchase." To the same effect is *Union Mutual Life Ins. Co.* v. *McMillan*, 24 Ohio St. 67; *Clark* v. *Middleton*, 19 Mo. 53; *Harris* v. *Runnels*, 12 How. 79. See also *Gold Mining Co.* v. *National Bank*, 96 U. S. 640; *National Bank* v. *Matthews*, 98 Id. 621; *National Bank* v. *Whitney*, 103 Id. 99; *Reynolds* v. *Bank*, 112 Id. 405; *Fortier* v. *Bank*, 112 Id. 439; Sedgwick on Statutory and Constitutional Law, 2d ed., 73, 340; *Thorington* v. *Gould*, 59 Ala. 461.

It may be objected that, inasmuch as the New England Mortgage Security Company derived its corporate existence and powers from the state of Conneticut, and is therefore not subject to the jurisdiction of our courts, save as it may attempt to exercise its corporate functions within this state, both the state and the people are without remedy, if the corporation is allowed to enforce a contract made in disregard of our constitutional prohibition. This would seem to follow as a necessary sequence. But is that a sufficient reason for disregarding the sound logic and morality of the many authorities cited above? Suppose the framers of our constitution, instead of confining their inhibitory language to foreign corporations, had declared

that no domestic corporation shall do any business without having at least one known place of business, etc.,—would any one contend that a contract entered into in disregard of such prohibition would be void? The authorities cited above, and countless others, with uniform voice answer such inquiry in the negative. Suppose our constitution had two inhibitory clauses, one applicable to foreign and the other to domestic corporations, but in all other respects alike,—could we give different interpretations, and hold that the violation of one would annul the contract, while the violation of the other would simply arm the state with power to vacate the charter for the abuse?

Another argument: The legislature, at its last session (Sess. Acts, 102), passed an act "to give force and effect to section 4, of article 14, of the constitution of the state of Alabama,"—the section we are interpreting. That statute points out the mode of declaring and making known the designated place of business, and the authorized agent or agents to reside thereat, of foreign corporations proposing to do business in this state. It also imposes heavy penalties on foreign corporations and their agents for engaging in business without complying with the statute, and provides a means for their collection. It does not make the contract void. Contracts by foreign corporations entered into since the approval of that statute—February 28, 1887—would not be void, but the offenders would be liable to the penalties: Sedgwick on Statutory and Constitutional Law, 2d ed., 339–341; *Ala. Gr. So. R. R. Co.* v. *McAlpine*, 71 Ala. 545.

Would it not be strange if the constitutional prohibition—a matter not within legislative control—should receive one interpretation before the enactment of the statute, and a different one after the enactment? The circuit court erred in overruling plaintiff's demurrer to pleas 2, 3, 4, 5.

In what we have said, we have no wish to question or weaken our former decisions holding that contracts by or with corporations which are outside of their corporate powers cannot be enforced. We are unwilling, however, to extend that principle, and make it embrace a case like the present.

We are aware that this court has held the clause in the constitution we been considering to be prohibitory, without legislative action to give it effect: *American U. Tel. Co.* v. *W. U. Tel. Co.*, 67 Ala. 26; 42 Am. Rep. 90; *Beard* v. *U. & Amer. Pub. Co.*, 71 Ala. 60. Neither of these cases, however, was

decided on that question. Nor did we consider what effect the constitutional prohibition would have on contracts made by foreign corporations without compliance with its requirements. This case brings that question before us for the first time.

The questions on the admissibility of evidence will not be likely to arise again in the form in which this record presents them. The execution and seal of the corporation, appended to the power of attorney, can be proved by deposition, and examined copies of the by-laws in the same way.

Reversed and remanded.

CONTRACT BY OR WITH CORPORATION, when *ultra vires: Chicago Gas Light Co.* v. *Gas Light Co.*, 2 Am. St. Rep. 124; *Miners' Ditch Co.* v. *Zellerback*, 99 Am. Dec. 300; *Rock River Bank* v. *Sherwood*, 78 Id. 669, and note 677; *Bradley* v. *Ballard*, 8 Am. Rep. 656; *Northern Union Packet Co.* v. *Shaw*, 19 Id. 781.

ESTOPPEL TO RAISE QUESTION OF ULTRA VIRES: *Day* v. *Spiral Spring Buggy Co.*, 58 Am. Rep. 352; *Central Railroad* v. *Smith*, 52 Id. 353, and note 358; *Wright* v. *Pipe Line Co.*, 47 Id. 701; *State Board* v. *Citizens' Street R'y Co.*, 17 Id. 702; *Whitney Arms Co.* v. *Barlow*, 20 Id. 504; *Hough* v. *Cook County Land Co.*, 24 Id. 230; *Pixley* v. *West. Pac. R. R. Co.*, 91 Am. Dec. 623, and note 637.

FOREIGN CORPORATION, requirements which may be exacted of: *Ducat* v. *Chicago*, 95 Am. Dec. 529, and note 536–539; *Folger* v. *Columbian Ins. Co.*, 96 Id. 747; *Thorne* v. *Travelers' Ins. Co.*, 21 Am. Rep. 89; *Mowing Machine Co.* v. *Caldwell*, 23 Id. 641.

ESLAVA *v.* JONES.

[83 ALABAMA, 139.]

PUBLIC MINISTERIAL OFFICER IS ANSWERABLE IN CIVIL ACTION FOR ANY ACT OF NEGLIGENCE or misconduct, whereby damage proximately results to the party complaining.

WRONGFUL ISSUE OF WRIT, WHEN ACTION WILL NOT LIE THEREFOR. — An action for damages does not lie against a circuit clerk who wrongfully issued a writ of *venditioni exponas*, commanding the sheriff to sell certain lands in the plaintiff's possession which had been previously levied on by an execution against another. The issue of the writ in such case, and the sale thereunder, did not affect the right, title, or possession of the plaintiff, and the costs, expenses, and attorney's fees necessarily incurred in defense of a suit brought by the purchaser to recover possession of the lands alleged as special damages, not being the natural and proximate consequences of issuing the writ, the action cannot be maintained.

MALICE AND WANT OF PROBABLE CAUSE MUST CONJOIN to render actionable the misuse or abuse of legal process in the common-law or ordinary remedies.

ACTION brought by Odyle Eslava against the defendant, Jones, clerk of the circuit court, claiming damages for the defendant's alleged negligent and wrongful act in issuing a writ of *venditioni exponas*, under which the sheriff sold certain lands. Other facts appear in the opinion. A demurrer to the complaint was sustained, and the plaintiff assigned error.

S. P. Gaillard, for the appellant.

Pillans, Torrey, and Hanaw, contra.

By Court, CLOPTON, J. When an individual suffers damages by any act of negligence or misconduct of a public officer in respect to any ministerial duty annexed to his office, he is answerable to such individual in a civil action; but in such case, a wrong committed by the officer, and resulting damage to the party complaining, must concur, to give title to a remedy: *Bellinger* v. *Glenn*, 80 Ala. 190; 60 Am. Rep. 980. While actual or specific damage is not indispensable, the party complaining, however amiss may be the act, must have suffered injury, either actual or implied, or presumed, from an invasion of his rights, or from a breach of duty owing to him.

The grievance alleged is the issue by the defendant, as clerk of the circuit court, of a *venditioni exponas*, commanding the sheriff to sell certain lands therein described, which had been previously levied on by an execution issued on a judgment in favor of Charles Farley against Celestine Eslava, and the sale suspended by the interposition and contest of a claim of exemption, during the pendency of which the defendant in execution died. The *venditioni exponas*, and the sale of the lands thereunder, were held to be a nullity, conferring no title on the purchaser, in *Sims* v. *Eslava*, 74 Ala. 594, on the ground that there had been no termination of the contest in favor of the plaintiff. The appellant, who was plaintiff in the circuit court, was not a party nor privy in the case in which the judgment was rendered, and was not in any way connected with the judgment or the writ. In respect to the judgment or process thereon, the clerk owed no official duty to the plaintiff, and no damages resulted to her such as the law implies from the wrongful issue of the writ. The act of the clerk, though illegal and unauthorized, did not confer on plaintiff any legal claim, any right of action against him, unless, on the facts averred, she sustained special damages,

which are recoverable: *Dehn* v. *Heckman*, 12 Ohio St. 181; *Ware* v. *Bond*, 2 Bond, 267; *Harrington* v. *Ward*, 9 Mass. 251.

The only special damages claimed are, that plaintiff was compelled to pay divers costs, expenses, and attorneys' fees, in defense of a suit to recover possession of the lands, brought against her by the purchaser at the sale under the *venditioni exponas*, and in defense of the appeal from the judgment rendered in the suit in her favor, which was affirmed on appeal. The only title or right to the lands shown by the averments of the complaint is such as the law implies from plaintiff's possession at the time the writ was issued, and the lands were sold. The levy of an execution on lands, unlike a levy and seizure of personal property, confers no right or title on the sheriff, and such levy does not constitute him a trespasser, though the lands may not belong to the defendant in execution, and may be in the possession of a third person. The issue of the *venditioni exponas*, and the sale thereunder, did not operate to impair or affect the title or right of the plaintiff, nor to injure or disturb her possession. The utmost that can be said is, that the purchaser is thereby armed with the power to bring suit. The damages claimed are not the natural and proximate consequences of issuing the writ, but of the institution of the suit.

However groundless may be the claim, no action lies at the suit of the defendant to recover costs and expenses incurred in the defense of an action in any of the ordinary forms, — for a mere wrongful resort to legal process. To constitute the misuse or abuse of legal process, in the common-law or ordinary remedies, actionable, malice and want of probable cause must conjoin: *Tucker* v. *Adams*, 52 Ala. 254; *Bolling* v. *Tate*, 65 Id. 417; 39 Am. Rep. 5. Though the *venditioni exponas* was a nullity, and the purchaser acquired no title by the sale, the plaintiff could not maintain an action against him to recover the costs and expenses paid by her in defense of the suit to recover possession of the lands. The bringing the suit was the act of the purchaser, — the intervention of another cause, by which the plaintiff cannot pass, and support an action against the clerk to recover damages for which the immediate actor is not suable. Though the illegal and unauthorized act of the clerk may have furnished the occasion, it was not the efficient and dominant cause, which

put the intervening and immediate cause in operation. The issue of the *venditioni exponas* is, as to the plaintiff, *damnum absque injuria*.

Affirmed.

PUBLIC OFFICER, LIABILITY FOR MINISTERIAL ACTS: *Flournoy* v. *City of Jeffersonville*, 79 Am. Dec. 468, and note 472; liability of judicial officer exercising ministerial functions: *Robinson* v. *Chamberlain*, 90 Id. 713, 726.

ABUSE OF PROCESS, TRESPASS AB INITIO: *Barrett* v. *White*, 14 Am. Dec. 352, and note 365; *Welsh* v. *Cochran*, 20 Am. Rep. 519.

OFFICER IS NOT LIABLE TO ACTION FOR REFUSING TO EXECUTE PROCESS REGULAR ON ITS FACE, BUT IN FACT VOID: *Newbury* v. *Munshower*, 23 Am. Rep. 769.

KEEL *v.* LARKIN.

[88 ALABAMA, 142.]

FRAUDULENT CONVEYANCES — RECONVEYANCE BY FRAUDULENT GRANTEE TO FRAUDULENT GRANTOR. — If a debtor buys land, paying for it with his own means, and with the intent of fraudulently placing it beyond the reach of his creditors takes the title in the name of another person, the land becomes subject to the debts of the fraudulent grantee, and the right of his creditors to have it sold in payment of his debts cannot be defeated by a subsequent voluntary reconveyance to his fraudulent grantor.

CONVEYANCE BY FRAUDULENT DEBTOR TO HIS WIFE, IN CONSIDERATION OF RELINQUISHMENT OF DOWER. — Where a debtor buys land, and with intent to defraud his creditors takes title in the name of another, and afterwards procures a reconveyance from his fraudulent grantee, and then conveys a portion of the land to his wife, in consideration of her release of dower right in other lands, the conveyance to the wife will be sustained against judgment creditors, either of the debtor or his original fraudulent grantee, it appearing that the wife had no knowledge of her husband's indebtedness, or notice of the fraud under which he acquired title to the land.

JUDGMENT CREDITOR WILL NOT BE FORCED TO ELECT BETWEEN ACTION AT LAW and a suit in equity, where, having separate judgments against his debtor and his debtor's surety, he proceeds at law to subject land as the property of the principal, and at the same time, by a bill in equity, proceeds to subject the same land as the property of the surety. Though the plaintiff in such case can have but one satisfaction of his claim, he should not be required to elect in which court he will proceed.

BILL in equity filed September 7, 1883, by William R. Larkin against Lemuel H. Lewis, and the personal representative, widow, and children of Lemuel G. Mead, deceased, and seeking principally to subject to the satisfaction of a judgment obtained by the complainant against said Lewis certain land which Lewis had conveyed to Mead in his lifetime, in alleged fraud of his creditors. Said judgment was rendered March 8,

1879, and was founded on two promissory notes under seal, executed by Lewis and Mead jointly, the former signing as surety for the latter; and the complainant had obtained a judgment against Mead on these notes, October 26, 1877. Executions on each of these judgments were issued, and returned "No property found," and after Mead's death, January 14, 1888, an execution against him having been levied on the land, his widow and children claimed a homestead exemption. The notes were given in settlement and extension of a former debt of Mead, on which a suit in chancery was then pending. The land — two hundred acres — was conveyed to Lewis by one Outerbridge and wife, by deed of October 27, 1873, on the recited consideration of four thousand dollars; but the bill alleged that the purchase-money was paid by Mead, then indebted to the complainant, and that the title was taken in the name of Lewis, his nephew, with intent to defraud his own creditors, and especially the complainant, whose original debt had then accrued. Lewis conveyed the land to Mead by deed of May 28, 1875, reciting the payment of a consideration of three thousand dollars; but the bill alleged that the conveyance was executed with the fraudulent intent to place the property beyond the reach of the complainant as a creditor of Lewis, and to enable Mead, who resided with his family on the land, to claim a homestead exemption as against the complainant's judgment, and that in fact no consideration was paid. March 26, 1876, Mead conveyed forty acres of the land, with about ninety acres of other land, to said Lewis, in trust for Mary F. Mead, the grantor's wife, on the recited consideration of her release of dower right in other lands which Mead had sold and conveyed; and the bill sought to set aside this deed also, on the ground of no consideration therefor, and that it was executed with the fraudulent intent on Mead's part of reducing the Outerbridge tract, so that the residue might be claimed as a homestead exemption. After Mead's death, his estate having been declared insolvent, his widow and children claimed an exemption in the homestead tract, which appears not to have been contested in the probate court; and an execution on the complainant's judgment against him having also been levied on the land, they filed a claim of homestead exemption in the circuit court, which the complainant contested. Demurrers were interposed by the guardian *ad litem* of the infant defendants, and on a hearing some of the grounds of demurrer were sustained and some were overruled. On ap-

peal, errors being assigned by each party, the decree was affirmed on the assignments of error by the defendants, but was reversed on the assignment of errors by the complainant. After reversal, the cause was submitted for final decree on pleadings and proof, and the chancellor decreed in favor of the complainant, declaring the conveyance from Lewis to Mead, and the subsequent conveyance by Mead to Lewis in trust for Mrs. Mead (now Mrs. Keel), fraudulent and void, as against the complainant's judgment against Lewis, and condemning the entire tract to the satisfaction of said judgment. The defendants assign this decree as error, separate assignments of error being made by Mrs. Keel and the infant children.

D. D. Shelby, for the appellants.

R. C. Brickell and J. E. Brown, contra.

By Court, STONE, C. J. When this case was before us at a former term (*Larkin* v. *Mead*, 77 Ala. 485), we passed only on the equity of the bill, and held it made a case for equitable relief. In that case, the question was raised on demurrer, and only the averments of the bill could be considered. Taking the averments to be true, we held that Mead, and those claiming in his right, were estopped from setting up any title, legal or equitable, in him, Mead, at the time he induced Larkin to accept Lewis as surety. Our ruling was rested on the averments that "Mead induced Larkin to dismiss his suit to subject the proceeds of the life policy, and to extend time of payment on his notes or bonds, with Lewis as surety, ... on the representation that Lewis held a fee-simple title to the lands."

The case comes before us now on pleadings and testimony, and on the chancellor's final ruling thereon. The answers deny the averments of the bill on which its equity was rested at the former hearing, and there is not a semblance of testimony offered in support of those averments. We must therefore determine this case on the other questions raised.

We hold that the testimony authorizes us to draw the following conclusions of fact: That Mead purchased the Outerbridge tract of land,—the land in controversy,—and paid for it with his own means, and took the title in the name of Lewis, with the intent of fraudulently placing it beyond the reach of his creditors generally, and particularly to hinder and defeat any attempt the present complainant might make to subject it to the demand set up in the bill; that Lewis ac-

cepted and held the title in secret trust for the benefit of Mead, to aid him in consummating his fraudulent design; and that when, in the changed conditions, it became unsafe for the title to remain in Lewis, it was voluntarily retransferred to Mead, who had greater facilities for further covering it beyond the pursuit of creditors, and with the intent that he should do so. We speak of Mead's intent; for we are convinced that Lewis had neither interest nor intent, further than to aid Mead in carrying his fraudulent purposes into execution.

It is contended for appellants that when Lewis transferred the title of the land to Mead, he only placed it in him who had paid the purchase-money, thus executing the trust which had been reposed in him; and that such conveyance cannot be a fraud on the creditors of Lewis, no matter what his motive may have been; that the land, *ex æquo et bono*, belonged to Mead, and it cannot be a fraud to place the title where it rightfully should be; that the land, so far as creditors are concerned, has all the while belonged to Mead, and the conveyance only made visible that which already existed, though secretly.

There are authorities which seem to maintain this proposition: *Clark* v. *Rucker*, 7 B. Mon. 583; *Davis* v. *Graves*, 29 Barb. 480; *Cramer* v. *Blood*, 57 Id. 155; 48 N. Y. 684. And the following authorities, it is contended, go far to support the same principle: *Caffal* v. *Hale*, 49 Iowa, 53; *Clemens* v. *Clemens*, 28 Wis. 637; 9 Am. Rep. 520; *Parker* v. *Tiffany*, 52 Ill. 286; *Matthews* v. *Buck*, 43 Me. 263; *M. Savings Bank* v. *Lyle*, 7 Lea, 431; *Petty* v. *Petty*, 31 N. J. Eq. 8; *Moore* v. *Livingston*, 14 How. Pr. 1; Wait on Fraudulent Conveyances, sec. 398. In none of these cases, however, was the question of actual, intentional fraud in the reconveyance either proved or relied on. In the present case, as we have stated, we are satisfied that in the original placing of the title in Lewis, and in the retransfer to Mead, the purpose and intent were to defraud Larkin, and to hinder him in the collection of the debt this bill seeks to enforce. In reaching this conclusion, we are influenced by the clearly proven motive and intent of Mead, and the further manifest fact that Lewis was simply his instrument, without interest, and without independent motive.

When the title to the land was placed in Lewis, under the circumstances, and with the intent shown above, the fact that Mead had negotiated the purchase, and made the payment,

gave him no right, either in law or equity, to recover the lands from Lewis. Concurring, as they did, in the fraudulent intent, the law denies to each all redress as to any mere executory agreement. It leaves the title where they placed it, and and lets them severely alone. *In pari delicto, melior est conditio possidentis.* The law withholds its hand, not in furtherance of any claim the grantee may assert, but as a punishment of the bad motive of him who invokes its aid. *Ex turpi causa, non oritur actio.* Nor does such fraudulent grantee rest under a moral obligation to restore the property. If there be no obligation which is recognized and acted on, it is simply conventional; for moral obligation cannot be predicated of such iniquitous transaction. The foregoing reflections have reference to any contention which might arise between Mead and Lewis, and any right which either of them could assert, growing out of the several transactions.

There is another aspect of this question. When Mead purchased the land, and had the title placed in Lewis, Mead's creditors had a clear right, in equity, to have it declared his property, and to have it sold in payment of his debts. So, the title remaining in Lewis, his creditors had a clear right, as against him and Mead, to have the property sold in payment his, Lewis's, debts. Suppose the creditors of Mead instituted proceedings to condemn the land as his property, and the creditors of Lewis made a similar attempt to condemn it as his property, which class should prevail over the other? This question seems to have arisen in *M. Savings Bank* v. *Lyle*, 7 Lea, 431, and the ruling was, that the creditors of the fraudulent grantor should be first paid. That question does not arise in this case, for there are here no conflicting claims of opposing creditors. The debt sought to be enforced in this suit is equally the debt of Mead and Lewis, and the question as to which of two creditors shall have the preference does not arise.

When the renewal notes were executed, and as long as the title remained in Lewis, there can be no question that the land was subject to the debt, either as the property of Mead or of Lewis, at the option and pleasure of Larkin, the creditor: of Mead, because he purchased and paid for it, and had the title put in Lewis as a means of defrauding his creditors; of Lewis, because he owed the debt, the title was in him, and its liability to his debts could not, as a punishment for Mead's fraud, be gainsaid by the latter.

It is contended for appellants that, inasmuch as Mead and Lewis are alike bound for the debt this bill seeks to enforce, there can be no fraud in transferring the title from the latter to the former, because in either holding the property remains alike liable for one and the same debt. On this ground, it is claimed that the intent to delay, hinder, or defraud cannot be predicated of the facts connected with the retransfer.

If the adventitious surroundings of the two parties were similar, this position would seem to be impregnable. But they were not similar. Mead was a married man, and had his residence on the land. Lewis was unmarried, and did not reside on the lands. Mead could claim homestead exemption, which Lewis could not do. Mead, having a wife, with inchoate right of dower in her, could and did make that inchoate right a basis of negotiation and contract by which he secured to her a valuable interest in the land, which incidentally inured to his enjoyment and benefit. This Lewis could not have done. The facts and circumstances convince us that the whole purpose of this reconveyance was to enable Mead, on the very plan that he carried out, to place the property in controversy where he and his family could enjoy it, and Larkin could not make it subject to his claim. The title left in Lewis, he could not accomplish this result, nor cover the property beyond Larkin's reach. This presents all the elements of actual fraud. In the case of *Chapin* v. *Pease*, 10 Conn. 69, Moses Pease, being embarrassed, conveyed the land in controversy to Barnabas Pease without consideration, and with intent to delay and hinder his creditors. The title remained in Barnabas eleven years, during which time he contracted debts, and was on the verge of insolvency. Moses Pease having disembarrassed himself, Barnabas reconveyed the land to him without consideration, and became insolvent. A creditor of Barnabas, whose claim accrued while the title was in the latter, had the land levied on as the property of Barnabas; and Chapin claimed under the right thus acquired. The principal question was the validity of the reconveyance from Barnabas to Moses Pease. The court said: "The conveyance from the defendant (Moses Pease) to Barnabas Pease, being intended to defraud the creditors of the former, was void as to them, but good as between the parties. Neither at law nor in chancery could Barnabas Pease be compelled to reconvey. As between the parties, the conveyance stood on the same ground as if a full and adequate consideration had been paid. . . . .

As against everybody, then, but the creditors of his grantor, Barnabas Pease had a valid title. The recorded title was in him; and for a period of eleven years, and up to the time of his insolvency, he was held out to the world as the owner of the property. Under these circumstances, the conveyance from Barnabas to Moses Pease, being voluntary, was fraudulent and void as to the creditors of the former."

The case of *Allison* v. *Hagan*, 12 Nev. 38, is not distinguishable from the present one in principle. Mrs. Hagan being embarrassed conveyed her property — real estate — to Kerrin, upon no consideration, and with the fraudulent intent of delaying and hindering her creditors until she could raise money and discharge her debts, when Kerrin was to reconvey to her. Kerrin became indebted while the title was in him. He subsequently conveyed to Young without consideration, to be held by him for Mrs. Hagan's benefit. Young reconveyed to Mrs. Hagan. An effort was made to subject the property to Kerrin's debt; and Mrs. Hagan resisted it on the title which had revested in her under Young's reconveyance. An offer was made in the trial court to prove by Mrs. Hagan that the title had passed out of her, and again revested in her, by voluntary conveyances, with the intent and understanding stated above. This testimony was ruled out, and the land held subject to Kerrin's debt. The ruling of the lower court was affirmed in the supreme court, in a well-reasoned and instructive opinion. Among many other well-expressed reasons for its ruling, the revising court said: —

"From the offered testimony, Kerrin was not a trustee in any proper sense, but he was a fraudulent grantee as against the creditors of appellant (Mrs. Hagan), and Kerrin took the whole title of appellant in favor of his creditors. Appellant's creditors could have defeated the conveyance upon the ground of want of consideration, or on the ground of fraud; but neither Kerrin nor appellant could do so, as against Kerrin's creditors."

"Appellant contends that the offered testimony would have shown, or tended to show, that Kerrin never had any estate . . . . which in equity ought to have been subjected to the claims of his creditors, but that he was, on the contrary, bound to preserve the property for her, and that his deed to Young, and Young's deed to appellant, only resulted in an honest discharge of his obligation on Kerrin's part, and an execution of the trust. From the proposed testimony there can be no

doubt that Kerrin and appellant conspired together to delay the creditors of appellant. The law declares such conduct an offense against good morals, common honesty, and sound public policy.

"The law does not teach that an agreement entered into for the purpose of delaying or defrauding creditors of the vendor can be upheld or encouraged by declaring it a trust, nor will courts sustain it as such."

So in Bump on Fraudulent Conveyances, 3d ed., 443, it is said: "The principle that a collusive contract binds the parties to it is a simple principle which commends itself no less to the moralist than to the jurist, for there is no obligation upon any one to extricate a rogue from his own toils. On any other principle, a knave might gain, but could not lose, by a dishonest expedient; and inducements would be furnished to unfair dealings, if the law were to repair the accidents of an unsuccessful trick. A fraudulent grantee, therefore, is allowed to retain the property, not for any merit of his own, but for the demerit of his confederate, in accordance with a wise and liberal policy, which requires that the consequences of a fraudulent experiment shall be made as disastrous as possible. The law endeavors to environ a debtor with all possible perils, and make it appear that honesty is the best policy."

We hold that the conveyance from Lewis to Mead was inoperative and fraudulent, and vested no title in Mead against the creditors of Lewis; nor in any one else whose claim rested alone on the sufficiency of Mead's title, with nothing else to aid it.

The renewal notes or bonds, given by Mead and Lewis, bear date in December, 1874. The conveyance of the land from Lewis to Mead was in May, 1875. In March, 1876, Mead conveyed 135 acres of the land back to Lewis as trustee, to be held for the sole and separate use of Mary F. Mead, wife of Mead, the grantor. This deed recites, as its consideration and inducement, that Mead owned and had contracted to sell two tracts of land; one in Madison County, containing 125 acres, the other in Jackson County, containing 200 acres; that his wife, Mary F., refused to join in the conveyance, or relinquish her dower rights in said lands, without compensation therefor, and that to induce her to unite in the conveyance, he, Mead, executed the said deed to Lewis, in trust for her.

The bill charges that Mead induced his wife to interpose this objection to the execution of the deed; that the lands, to

the conveyance of which he pretended he had been forced to purchase her assent, were of inconsiderable value, and were encumbered to their full value; and that this, too, was done to place the property so settled beyond the reach of Larkin, and fraudulently to secure it for the use of Mead's family, himself included. Issue was formed on this feature of the bill, and Mrs. Mead, now Keel, denied all knowledge that her husband owed any debt whatever. The answers fully cast on complainant the burden of proving the foregoing charge. No testimony whatever was offered by complainant, bearing on this feature of the bill, while the defendant made proof tending to show that the settlement was not an unreasonable compensation for the right Mrs. Mead surrendered. Under these circumstances, we feel constrained to hold that Mrs. Mead was a purchaser for a valuable consideration; and there is no proof that she had notice of the fraud under which Mead acquired title to the land, nor of any fact or circumstance calculated to put her on inquiry. The settlement of the 135 acres for her benefit must stand: *Hoot* v. *Sorrel*, 11 Ala. 386; *Bailey* v. *Litten*, 52 Id. 282.

As to the remaining land, outside of the settlement for the benefit of Mrs. Mead, it is subject to Lewis's debt, and against such liability neither Mead, if living, nor any one standing in his right, can successfully claim homestead exemption. So far as the rights of the parties to this suit are concerned, it is Lewis's property, not Mead's.

In the suit at law, the attempt is to subject the land as Mead's. The present suit proceeds against it as the property of Lewis. Of course both cannot succeed, and one of the suits ought to be abandoned. It is not a case, however, where the plaintiff or claimant should be forced to elect in which court he will proceed: Rule of Practice, 113. The suit at law and the bill in chancery are not instituted for the same claim, as the law understands that phrase.

The decree of the chancellor is reversed, and a decree here rendered, declaring that the land conveyed to Lewis, for the use and benefit of Mrs. Mead, now Keel, is not subject to complainant's claim, and as to that part of the land the bill is dismissed. As to the residue of the land, the complainant is entitled to relief. The register will report to the next term of the chancery court the amount due complainant on the judgment against Lewis, with interest computed to the coming in of the report; and to this end he will consider the testimony

on file, and any other lawful testimony that may be offered. All other questions are reserved for decision by the chancellor.

Reversed and remanded.

FRAUDULENT CONVEYANCES, INSTANCES OF: *Crawford* v. *Kirksey*, 28 Am. Rep. 704, and note 721; *Clark* v. *Depew*, 74 Am. Dec. 717; *Castro* v. *Illies*, 73 Id. 277; remedies of judgment creditor: *Logan* v. *Logan*, 1 Am. St. Rep. 212.

VOLUNTARY DEED FROM HUSBAND TO WIFE, when valid as against creditors: *Thompson* v. *Allen*, 49 Am. Rep. 116; and see *Warlick* v. *White*, 41 Id. 453; *Filley* v. *Register*, 77 Am. Dec. 522; *Belford* v. *Crane*, 84 Id. 155; *Pike* v. *Miles*, 99 Id. 148; *Wilder* v. *Brooks*, 88 Id. 49, and note 54.

GREEN *v.* JORDAN.

[83 ALABAMA, 220.]

WHERE SHERIFF'S SALE OF LANDS UNDER EXECUTION IS SET ASIDE, and the deed vacated, after the purchaser has entered into possession, his continued possession thereafter is that of a mere trespasser.

PLAINTIFF IN EJECTMENT, OR STATUTORY ACTION IN NATURE OF EJECTMENT, MAY RECOVER on proof of prior actual possession only as against a mere trespasser in possession, without regard to the validity or sufficiency of the muniments of title offered in evidence to support a recovery.

COURTS OF LAW TAKE NO COGNIZANCE OF EQUITABLE ESTATES, and deal only with legal titles.

TO SUSTAIN EJECTMENT, OR STATUTORY ACTION IN NATURE OF EJECTMENT, except as against a mere trespasser, the plaintiff must have a legal title at the commencement of the suit, and a title subsequently accruing will not authorize a recovery.

DESCRIPTION OF LANDS IN DEED, OR IN COMPLAINT, as a particular quarter-section, "except two acres in the southeast corner," is sufficiently certain and definite; the exception in the description being construed to mean two acres in such corner, lying in a square, and bounded by four equal sides.

WHERE COMPLAINT DESCRIBES LANDS SUED FOR as east half of a certain tract, a deed for the south half of the same tract is properly admissible in evidence, since the one is necessarily overlapped by the other in part.

TAX RECEIPTS, SHOWING PAYMENT OF TAXES ON LAND BY ONE IN POSSESSION, are admissible in evidence for him as tending to show both a claim of ownership and the extent of the claimants' possession.

IT IS UNNECESSARY TO PRODUCE DEEDS OR OTHER WRITINGS, or account for their absence, in order to legalize a mere incidental mention of their existence by a witness, no attempt being made to prove their contents or legal effect.

STATUTORY real action in the nature of ejectment brought August 2, 1884, by Georgia Ann Jordan against J. J. Green and Mrs. Hooper, to recover the possession of certain land described in the complaint as "the east half of the north half

of the east half of the southwest quarter of section 12, township 19, range 26, excepting two acres in the southeast corner, containing eighteen acres more or less." A demurrer to the complaint on the ground that "the description of the land sued for is vague, uncertain, and indefinite" was overruled, and the defendants pleaded not guilty. The plaintiff claimed title under a deed from one Holman, dated September 21, 1871, and another deed from Holman, dated August 15, 1884, after the commencement of the action, which was executed for the purpose, as alleged, of correcting a mistake in the description of the land in the former deed. The defendants were in possession when the action was commenced, and at the date of the last deed to the plaintiff. Their claim of title to the lands was based upon a conveyance made to them by the sheriff of the county; they showed that, in 1878, the defendant, Green, commenced suit against said Holman, and judgment by default being rendered in May, 1879, the land, which had been attached in the suit, was sold by the sheriff under execution, and a sheriff's deed was executed to Green and George W. Hooper as the purchasers. This judgment, on motion of Holman, was set aside by the court in November, 1881, but the purchasers at the execution sale continued in possession until Hooper's death, in July, 1883, and after his death, his widow (Mrs. Hooper) and said Green continued in possession until the commencement of this action against them. The plaintiff proved her possession of the land for several years, under the Holman deed first above mentioned, and until her tenants were dispossessed by Green and Hooper, as purchasers at the sheriff's sale, and she offered in evidence both of the Holman deeds. The first of said deeds described the land as the south half of the forty-acre tract, and the defendants objected to its admission in evidence because of this variance; and they objected to the admission of the second deed in evidence because of its execution after the commencement of the suit, and while they were in the adverse possession of the land. Each of said objections was overruled, and the defendants excepted. Other evidence offered by the plaintiff, the nature of which sufficiently appears in the opinion, was admitted, against the objections of the defendants, to which they duly excepted.

John M. Chilton, for the appellants.

George P. Harrison, Jr., *contra*.

By Court, SOMERVILLE, J. 1. The setting aside of the sheriff's sale of the lands in controversy, and the vacating of the sheriff's deed under which the defendants claimed title, annulled the only muniment of title which they had, and left them in the possession of the lands thereafter as mere trespassers: *Scranton* v. *Ballard*, 64 Ala. 402.

2. The plaintiff might, therefore, be entitled to recover against the defendant on the strength of her prior actual possession of the premises, apart from the validity or sufficiency of the muniments of title introduced by her: *Wilson* v. *Glenn*, 68 Ala. 383; *Eakin* v. *Brewer*, 58 Id. 579.

3. The deed of August 15, 1884, having been executed by Holman to the plaintiff after the commencement of this suit, would not avail to support a recovery in this action, and was improperly admitted in evidence. It may be that the plaintiff had an equitable title to the land obtained through Holman's deed executed to her in September, 1871, in which there entered a mere mistake of description, and that a court of equity would perfect her title by compelling specific performance. But courts of law take no cognizance of equitable estates. They deal only with legal titles: *Hooper* v. *C. & M. R'y Co.*, 78 Ala. 213. To support ejectment, the plaintiff must have title at the commencement of the suit, and a title subsequently accruing will not authorize a recovery: *Goodman* v. *Winter*, 64 Id. 411; 38 Am. Rep. 13; *Pollard* v. *Hanrick*, 74 Ala. 334. It has accordingly been held by this court that the admission in evidence of a patent issued since the commencement of an action of ejectment is error, except where a legal inchoate title to the same land sufficient to maintain the suit had previously been shown in evidence. It is then admissible only to repel the attack on the previous inchoate right: *Johnson* v. *McGehee*, 1 Id. 186; *Jones* v. *Inge*, 5 Port. 327; *Bullock* v. *Wilson*, 5 Id. 338. Under this principle, the deed in question should have been excluded. It did not relate back to the commencement of the suit, under the doctrine of relation. An equity cannot be thus perfected into a legal title, after suit brought, by voluntary conveyance so as to support an action of ejectment which would otherwise not be maintainable: Sedgwick and Wait on Trial of Title to Land, 2d ed., secs. 454, 495, 541, 795. The case of *Ridgway* v. *Glover*, 60 Ala. 181, involved the execution of a sheriff's deed, made under order of court, and in its presence; and may on that ground be distinguished from the case of a voluntary conveyance, if that

decision can be sustained at all as sound in logic or as supported by authority.

4. The description of the land in the complaint, as well as that in the deed of September, 1871, from Holman to the plaintiff, was sufficiently certain and definite. The phrase "except two acres in the southeast corner" must be construed to mean two acres in such corner, lying in a square, and bounded by four equal sides: *Doe* v. *Clayton*, 81 Ala. 391; *Wilkinson* v. *Roper*, 74 Id. 141; *L. & N. R. R. Co.* v. *Boykin*, 76 Id. 560.

5. The deed, on its face, included a portion of the land described in the complaint, the deed describing the south half of a certain tract, and the complaint describing the east half of the same tract. The one, therefore, overlapped the other in part, and the objection to the admission of the deed in evidence was for this reason properly overruled.

6. The payment of taxes on land, taken in connection with an actual possession by the tax-payer, and other facts in evidence, tended to show both a claim of ownership, and the extent of the claimant's possession. Tax receipts, therefore, showing such payments, are admissible in evidence when offered in support of actual possession: *Baucum* v. *George*, 65 Ala. 259; *Jay* v. *Stein*, 49 Id. 514; Angell on Limitations, sec. 396, note 6, sec. 397.

7. The parts of the deposition of Stephen Holman, to which objections were taken, contained mere incidental references to certain deeds of conveyance. No effort was made to prove the contents or legal effect of such writings. It was unnecessary, therefore, to produce the writings or account for their absence, in order thus to legalize a mere mention of their existence: *Hancock* v. *Kelly*, 81 Ala. 368.

The judgment is reversed, and the cause remanded.

EJECTMENT, TITLE REQUISITE TO MAINTAIN ACTION OF: *Huntington* v. *Jewett*, 95 Am. Dec. 788; *Rowe* v. *Beckett*, 95 Id. 676.

CONSTRUCTIVE POSSESSION SUFFICIENT TO MAINTAIN POSSESSORY ACTION: *Anderson* v. *Hapler*, 85 Am. Dec. 322, note.

PLAINTIFF IN EJECTMENT IS ENTITLED TO RECOVER against mere intruder without title, upon showing that his ancestor died in possession of the land: *Mobley* v. *Bruner*, 98 Am. Dec. 360.

EJECTMENT AGAINST VENDEE IN POSSESSION of land under contract of purchase refusing to perform: *Hicks* v. *Lovell*, 49 Am. Rep. 679; and see *Twyman* v. *Hawley*, 18 Id. 661; *Harris* v. *Frink*, 10 Id. 318.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY v. YARBROUGH.

[83 ALABAMA, 238.]

CONTRIBUTORY NEGLIGENCE. — A person is not a trespasser who, by the conductor's permission, is on a freight-car while it is being loaded, nor is his presence there contributory negligence, unless it was known to him that the conductor exceeded his authority in granting such permission.

IN ACTION FOR DAMAGES FOR PERSONAL INJURY, LOSS OR DIMINUTION OF CAPACITY to follow the plaintiff's usual business or employment is a proper subject for compensation. The extent and nature of plaintiff's business, and his physical capacity to perform work at the time he was injured, may be shown; and where one of the injuries sustained was the breaking of an arm, it is competent for him to prove that his other arm had been previously disabled, not as an element of recoverable damages, but as showing the decreased capacity produced by the injury complained of.

OPINION EVIDENCE. — In an action against a railroad company for personal injuries sustained by the plaintiff, caused by a steam-shovel, the testimony of the person who was operating the shovel, that "after it had started, and plaintiff had placed himself under it, no human effort could have prevented the lever or the bucket from swinging to its accustomed place," is not the statement of mere opinion, but of the result of personal observation and knowledge as to a collective fact, and may be properly received in evidence.

ACTION by one Yarbrough against the Alabama Great Southern Railroad Company to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of the defendant's servants. At the time of the injury, the plaintiff was standing on one of the defendant's cars while it was being loaded with slag by means of the steam-shovel; and the plaintiff testified in his own behalf that the conductor of the defendant's train informed him "he could stand on the car, and pick the scrap-iron out of the slag as it was loaded." To this testimony the defendant objected, and duly excepted to its admission. The plaintiff further testified, in answer to a question by his own attorney, "that he had been shot in the other arm during the late war, and had but little use of that arm since"; and the question and answer were admitted as evidence, against the objection and exception of the defendant. Two other witnesses, introduced by the plaintiff, testified in substance that the steam-shovel could have been easily stopped after it had started, in time to prevent the accident. The conductor of the train was examined as a witness for the defendant, and denied that he had ever given the plaintiff permission to stand on the car, and said that he

had warned him against the danger. Other facts appear in the opinion.

Denson and Dobbs, and Wood and Wood, for the appellant.

S. L. Weaver, and Stiles and Purser, contra.

By Court, CLOPTON, J. It was specially pleaded that plaintiff contributed to his own injury in this, as is claimed, that he was wrongfully on the car of the defendant while it was being loaded with slag. To disprove this, the plaintiff was permitted to testify that the conductor had previously informed him that he could stand on the car and pick the scrap-iron out of the slag, while it was being loaded. It is contended that the evidence is illegal by reason of the conductor's want of authority to grant such permission. The conductor was an agent of the defendant corporation, having the control and management of the train, and charged with its operation. Being thus charged, his permission for the plaintiff to stand on the car is not outside of the scope of his authority, though he may have been guilty of a breach of duty for which he is answerable to the company. A person riding without paying fare, by permission of the conductor, is not a trespasser, though the train is not intended and operated for the carriage of passengers, and though the conductor has no authority to permit such person to ride. The plaintiff, as between himself and the defendant, was not a trespasser, nor wrongfully on the car, so as to constitute the act, in itself, contributory negligence, if he was on the car by permission of the conductor, unless it was known to him that the conductor exceeded his authority: *Wilton* v. *Middlesex R. R. Co.*, 107 Mass. 108; 9 Am. Rep. 11; *Gradin* v. *St. Paul etc. R'y Co.*, 11 Am. & Eng. R. R. Cas. 644; 2 Wood's Railway Law, sec. 298. For this purpose the evidence was admissible.

2. The general rule is, that the party injuring another by a wrongful act is liable for all the direct injury consequent thereto, though it may not have been contemplated as the probable result. The loss or diminution of capacity to follow one's usual business or employment is a proper subject for compensation. The extent and nature of the business or employment of the plaintiff, and of his physical capacity to perform the work at the time he was injured, may be shown. One of the injuries suffered by plaintiff was the breaking of his arm. As tending to show the extent of the decrease of his

capacity to work and pursue his employment, it was competent to prove that his other arm had been previously disabled; not as an element of recoverable damages, but to aid in estimating a fair and just compensation for the decreased capacity produced by the injury. But the evidence should be confined to the fact and extent of the previous disability, and not extended to a detail of the circumstances under which it occurred. While the question propounded is proper, the answer of the witness is not responsive, and is otherwise objectionable. It does not state, except inferentially, the disability, its nature and extent. When, where, and how it occurred, are immaterial and irrelevant inquiries. The answer should have been excluded on the objection of the defendant.

3. The car was loaded with slag, by means of a shovel operated by steam. The defendant offered to prove by the witness Schwartz, who was operating the shovel, that after it had started, and plaintiff had placed himself under it, no human effort could have prevented the lever or bucket from swinging to its accustomed place. The evidence was excluded. The plaintiff had previously testified that he was standing in the end of the car which had been loaded, and on seeing the lever swing around he ran to the unloaded end of the car, when he was struck by the bucket suspended to the lever, and if he had remained where he was he would not have been struck by the bucket, but might have been by the lever. The manifest purpose of the evidence is to show that when plaintiff's peril was discovered, the swinging of the lever could not have been prevented so as to avoid the injury. The testimony is objected to on the ground that it is the opinion of the witness. Generally, a witness can testify only to facts, and mere opinion is not received unless the witness is an expert, and it relates to a matter as to which the jury are unable to draw correct inferences from the facts proved. But facts are frequently collective, and a combination of the known elements may be expressed in the form of conclusion or inference. Such inference is received, not as founded on the judgment of the witness, but as the result of his personal observation and knowledge, and as "an equivalent to a specification of the facts," because necessarily involved. The evidence offered falls within this rule. It is not the statement of mere opinion, but of the result of personal observation and knowledge as to a collective fact, the witness being subject to cross-examination as to the simple facts so combined, and the sufficiency of his

knowledge: *Pollock* v. *Gantt*, 69 Ala. 373; *Ware, Murphy, & Co.* v. *Morgan*, 67 Id. 461; *S. & N. Ala. R. R. Co.* v. *McLendon*, 63 Id. 266; 1 Wharton on Evidence, secs. 510–513.

The record does not show that exception was taken to the refusal of the court to give the several charges asked by the defendant. We cannot properly consider them.

Reversed and remanded.

TRESPASSER ON PREMISES OF RAILROAD COMPANY, WHO REGARDED AS: *Louisville etc. R. R. Co.* v. *Phillips*, 2 Am. St. Rep. 155, and cases collected in note 163; duty of railroad company towards trespassers: *Baltimore etc. R. R. Co.* v. *State*, 50 Am. Rep. 233; *Frazer* v. *South and North Ala. R. R. Co.*, 60 Id. 145; *Vicksburg etc. R. R. Co.* v. *McGowan*, 52 Id. 205, and note 208; trespassers on engine with assent of engineer, company not liable for injury: *Darwin* v. *Railroad Company*, 55 Id. 32, and note 42.

DAMAGES FOR PERSONAL INJURIES, ELEMENTS OF: See *International etc. R. R. Co.* v. *Terry*, 50 Am. Rep. 529; *Cincinnati etc. R. R. Co.* v. *Eaton*, 48 Id. 179; *Clapp* v. *Minneapolis etc. R. R. Co.*, 1 Am. St. Rep. 629; *Cooke* v. *England*, 92 Am. Dec. 628, note.

OPINION EVIDENCE, WHEN COMPETENT: *Baltimore etc. Turnp. Co.* v. *Cassell*, 59 Am. Rep. 175, and note 176; *Carthage Turnp. Co.* v. *Andrews*, 52 Id. 653; and see note on expert testimony, *Hammond* v. *Woodman*, 66 Am. Dec. 228–246.

CRAMPTON *v.* PRINCE.

[88 ALABAMA, 246.]

VENDOR'S LIEN — TITLE MADE IN NAME OF THIRD PERSON. — Where the purchaser of land gives his note for the unpaid balance of purchase-money, but at his request the legal title is made to a third person, the vendor's lien for the unpaid purchase-money attaches, without any special agreement for its retention, and follows the land in the hands of such grantee.

BURDEN OF PROVING WAIVER OF VENDOR'S LIEN, as between vendor and purchaser, is cast on the latter.

ENFORCEMENT OF VENDOR'S LIEN — COVERTURE AS A DEFENSE. — Where a married woman purchases land through the agency of her husband, who, in her name and by her authority, executes a promissory note for the unpaid balance of purchase-money, her coverture is no defense to a suit in equity to enforce a vendor's lien on the land, but is a defense to an action against her at law on the note.

PURCHASER CANNOT CLAIM ABATEMENT OF PURCHASE-MONEY BECAUSE OF DEFICIENCY of a few feet less in depth than stated in the deed, it appearing that the lot was sold in gross, that no representations were made as to its area, and that the boundaries were patent to ordinary observation and well known to the purchaser.

SETTLED RULE IN DESCRIPTION OF BOUNDARIES TO LAND IS, that monuments, whether natural objects or artificial marks, are allowed to dominate courses and distances given in deeds.

BILL in equity filed by Mrs. Prince against Mrs. Crampton, her husband, O. L. Crampton, and one Luling, seeking to enforce a vendor's lien in the plaintiff's favor, for a balance of purchase-money due and unpaid, as evidenced by Mrs. Crampton's promissory note for one hundred and fifty dollars, made payable to Mrs. Prince, or order, and signed in the name of Mrs. Crampton, by her husband, as agent. The agreed consideration for the land was seven thousand dollars, of which amount four thousand dollars was advanced to or for Mrs. Crampton by the defendant Luling, to whom a conveyance was executed by Mrs. Prince, at the request of Mrs. Crampton. Luling then conveyed to Mrs. Crampton, taking a mortgage on the property from her and her husband to secure the amount so advanced. This mortgage was paid and satisfied. Mrs. Crampton demurred to the bill for want of equity, the bill showing that she had purchased the land from Luling, and not from Mrs. Prince, and that the vendor's lien was waived by the acceptance of her note for the unpaid balance due by Luling; and in her answer she set up substantially the same defense. She likewise claimed an abatement of the purchase-money to the extent of the balance unpaid, by reason of an alleged deficiency in the quantity of land stated in the deed. Other facts appear in the opinion. The chancellor rendered a decree for the complainant, which decree is here assigned as error.

F. G. Bromberg, for the appellant.

G. L. and H. T. Smith, contra.

By Court, SOMERVILLE, J. 1. The bill alleges, and the proof shows, that the land in controversy was negotiated for, and in truth and fact purchased by, the appellant, Mrs. Crampton, through the agency of her husband, who, in her name, and by her authority, executed the note described in the bill which is claimed to constitute a vendor's lien on the land. The legal title was conveyed by the owner, Mrs. Prince, to Luling, at the request of Mrs. Crampton, and for her convenience. There is nothing in the record to support the assertion that Luling was the original purchaser from the complainant. Where an oral negotiation is thus made by a purchaser of land, and by his request or permission the legal title is made to another person, the vendor's lien for the unpaid purchase-money attaches, without any special

agreement for its retention, and follows the land in the hands of the grantee, who is bound by this special equity affecting it as a charge, of which he may have notice: *Pyland* v. *Reeves*, 53 Ala. 132; 25 Am. Rep. 605; *Moore* v. *Worthy*, 56 Ala. 163; *Sims* v. *National Com. Bank*, 73 Id. 248.

The vendor's lien exists, therefore, unless it is shown to have been waived or abandoned by some act of the complainant, and the burden of proving such waiver is cast on the defendants, who assert it as a fact: *Owen* v. *Bankhead*, 76 Ala. 143. No fact is shown by the record indicating such intention on the complainant's part. The dealings between Luling and Mrs. Crampton, whatever may have been their effect as between themselves, could not affect the rights of the complainant in this case, Luling himself setting up no priority of lien on the land, — his mortgage debt having been satisfied.

2. The coverture of Mrs. Crampton, while it may have been a complete defense to an action against her at law on her note, was no answer to a suit in equity to enforce a vendor's lien against the land sold by the complainant. It is as unconscionable for a married woman to get the land of another, and keep it without paying the purchase-money, as for one *sui juris* to do the same thing: *Carver* v. *Eads*, 65 Ala. 190; *Pylant* v. *Reeves*, 53 Id. 132; 25 Am. Rep. 605.

3. Under the facts of this case, the defendant had no right to abate the amount of the purchase-money on account of the alleged deficiency of the land described in the deed. This supposed deficiency arises from the fact that the lot sold lacks about five feet of being as deep as stated in the deed from complainant to Luling. The error, therefore, is one of estimated distances in measurement. The testimony shows very clearly that the complainant owned and occupied what was known as "the Ingersoll property"; that no representations were made as to its area; that it was sold in gross, and not by the foot; and that the extra five feet claimed by the purchaser was no part of the property. The important fact is shown, moreover, that the lot in controversy was bounded on three sides by a brick wall, and on the remaining side by an iron fence, all of which was patent to ordinary observation and known to the purchaser. The deed described it as bounded on the east side by Conception Street, and on the other three sides by other lots of land which are definitely described. The settled rule in the de-

scription of boundaries to land is, that monuments, whether natural objects or artificial marks, are allowed to dominate courses and distances given in deeds: 1 Greenl. Ev., 14th ed., sec. 301, p. 392, note 2. For this reason, abutting lands, when definitely described, control courses and distances, especially where they are not actually marked off, but are arrived at by estimation: 3 Washburn on Real Property, 5th ed., 427–434; *Younkin* v. *Cowan*, 34 Pa. St. 198; *White* v. *Williams*, 48 N. Y. 344. The reason of the rule is, that where there is a discrepancy between two descriptions, the one will be adopted as to which there is least liability of mistake: *Miller* v. *Cherry*, 3 Jones Eq. 29. Rejecting the description which is most apt to be erroneous, the law regards it as a mere misdescription, and not as a warranty of the quantity of land intended to be conveyed: *Rogers* v. *Peebles*, 72 Ala. 529; *Wright* v. *Wright*, 84 Id. 190; 3 Washburn on Real Property, 430, 431.

Under the foregoing principles, the demurrer to the bill was properly overruled by the chancellor.

The other assignments of error do not reach the merits of the case, and need not be considered.

The decree rendered is free from error, and must be affirmed.

VENDOR'S LIEN, EXISTENCE, WAIVER, AND ASSIGNABILITY OF: *Schnebly* v. *Ragan*, 28 Am. Dec. 195, and note 199; *Gee* v. *McMillan*, 58 Am. Rep. 315; *Sloan* v. *Campbell*, 36 Id. 493; *Madden* v. *Barnes*, 30 Id. 703; *Andrus* v. *Coleman*, 25 Id. 289; *Kendrick* v. *Eggleston*, 41 Id. 90; *Fouch* v. *Wilson*, 28 Id. 651; *Fonda* v. *Jones*, 2 Id. 669; *Hecht* v. *Spears*, 11 Id. 784.

SUBSISTENCE OF VENDOR'S LIEN AGAINST MARRIED WOMEN: *Kent* v. *Gerhard*, 34 Am. Rep. 612.

VENDOR WHO HAS EXECUTED ONLY BOND TO CONVEY HAS LIEN FOR UNPAID PURCHASE-MONEY: *Stevens* v. *Chadwick*, 15 Am. Rep. 348.

BOUNDARIES OF LANDS, WHAT CONTROLS: See *Paul* v. *Carver*, 67 Am. Dec. 607; *Franklin* v. *Dorland*, 87 Id. 111; *Stafford* v. *King*, 94 Id. 304.

MILLER *v.* LOUISVILLE AND NASHVILLE R. R. Co.

[83 ALABAMA, 274.]

POWER OF ATTORNEY AUTHORIZING AGENT TO SELL principal's lands at a price not less than a specified sum imposes upon the agent the duty of selling and accounting for the highest price obtainable, although the power was executed upon a valuable consideration paid by the agent, and this latter fact does not authorize the agent to reserve or acquire for himself any interest in the purchase.

PURCHASER FROM AGENT, WHO ALLOWS the latter to acquire an interest in the purchase in violation of his contract with his principal, is not a *bona fide* purchaser, so as to entitle him to protection against the right of the principal to set the sale aside.

ON BILL BY PRINCIPAL TO SET ASIDE CONTRACT OF SALE made by his agent, on the ground of fraud and collusion between the agent and purchaser, an averment that plaintiff "immediately after learning that said pretended sale had been made repudiated it, tendered back the money and notes, and notified defendants that he would not comply with such contract," sufficiently sustains the equity of the bill on demurrer; but before relief will be granted under the bill, the money and notes must be brought into court.

UPON BILL FOR REFORMATION OF WRITTEN CONTRACT on the ground of mistake, whether it is necessary to allege and show a prior request for the correction of the mistake, *quære*.

EQUITY HAVING ACQUIRED JURISDICTION for one purpose strictly equitable will dispose of the whole controversy, even though, in so doing, it may be called on to administer relief which pertains to courts of common law.

BILL to rescind a contract for the sale of land, on the ground of fraud and collusion between plaintiff's agent and the purchaser, and also to reform the power of attorney under which such agent acted. The substance of the power is stated in the opinion. The bill alleges that the writing, "by mistake and inadvertence," failed to express the real contract of the parties, to wit, that one fifth of the purchase-money in the event of a sale was to be paid in cash, and that the five thousand dollars paid in hand was to be considered a part thereof. The bill alleges that the contract between the agent and purchaser was fraudulent and collusive, for the reason that the agent knew and concealed the facts that the purchaser was a minor, had no visible property, and was insolvent, and because there was an understanding and agreement between them at the time of the pretended sale that the agent was to have an interest in said real estate.

S. J. and B. L. Hibbard, for the appellants.

Hewitt, Walker, and Porter, and Martin and McEachin, for the respondent.

By Court, STONE, C. J. The Louisville and Nashville Railroad Company, by power of attorney bearing date December 16, 1886, empowered Miller & Co. to make sale of certain lands and mineral interests, at any time within thirty days, and "at a sum not less than five hundred thousand dollars." The contract, or power, whichever it may be termed, has an additional stipulation, which is unusual in such instruments. It contains no stipulation for compensation to the agents making the sale; but if it were simply silent on this subject, the law would imply a promise to make reasonable payment for the services to be rendered. It is not silent. On the contrary, it recites a consideration of five thousand dollars paid or to be paid to the railroad company, for the thirty days' privilege of making the sale. Options to buy and options to sell are sometimes bought and sold. To purchase, and at large price, the privilege of becoming the agent of another to make a sale is certainly an anomaly. It is an anomaly, because the agent stands in a fiduciary relation to his principal, and is not permitted to be interested in the purchase, nor to make a profit on the transaction beyond his reasonable compensation: 2 Addison on Contracts, 924; *Adams* v. *Sayre*, 76 Ala. 509. In the present case the agent was authorized to sell at not less than five hundred thousand dollars; and he was to sell as agent. It was his duty to sell for as much more as he could obtain, and whatever sum he might realize above the fixed minimum of five hundred thousand dollars he was bound to account for to his principal. Other clauses of the instrument might be commented on, but we need not. Parties, however, if *sui juris*, may make their own contracts; and if they violate no principle of law or of public morality, they must perform their contracts as they make them. It is our province to enforce, not to make, contracts for parties.

What we have to say in this case will be confined to the case made by the bill.

The bill charges that the alleged sale was to a minor, known to Miller to be such, and that the alleged purchaser had no property, which Miller also knew. It also charges that Miller was to have an interest in the purchase. Each of these charges, unexplained and unrebutted, implies bad faith and fraud on the part of Miller, and *prima facie* arms the railroad corporation with the right to disaffirm and annul the contract of sale. And Jones cannot claim to be an innocent *bona fide* purchaser, if he allowed the complainant's agent, with whom

he made the contract, to acquire an interest with him in the purchase. True, the averments of the bill as to the nature and extent of the interest Miller was to have are not very specific: See *Flewellen* v. *Crane*, 58 Ala. 627; *Chamberlain* v. *Dorrance*, 69 Id. 40; but we think them sufficient to uphold the equity of the bill, at this stage of the litigation. If deemed advisable, the charges can be made more specific.

Many of the grounds of demurrer complain that the complainant fails to tender the notes and money to the purchaser, and yet claims rescission. The bill avers that "on the eighteenth day of January, 1887 [the alleged sale was made January 14, 1887], and immediately after it was known to orator that the said pretended sale had been made, orator tendered to said Miller the said money and notes, repudiated the said pretended and unauthorized contract of sale, and notified said Miller and said Jones that orator would not comply with such contract." This averment would probably have been more complete, if it had offered to bring the money into court, to abide any order the court might make, and to bring in the notes to be restored to Jones, or to be canceled. But at the present stage of the proceedings we do not consider this omission fatal to the equity of the bill. Of course, the chancellor will not grant the relief prayed for without requiring the complainant to do equity.

If reformation of the contract was the sole purpose for which the bill was filed, it would then become necessary to inquire whether Miller should not have been requested to correct the alleged mistake before filing the bill to have it corrected: *Robbins* v. *Battle-House Co.*, 74 Ala. 499. We have seen above, however, that the bill rests on an independent equity, — the alleged bad faith of Miller, in which Jones is charged to have participated. Having jurisdiction for one purpose strictly equitable, the court will dispose of the whole controversy, even though in doing so it may be called on to administer relief which pertains to courts of common law.

Affirmed.

RESCISSION OF CONTRACT IN EQUITY: See the notes to *Hough* v. *Hunt*, 15 Am. Dec. 572, 575; *Johnson* v. *Evans*, 50 Id. 672, 681; *Bryant* v. *Isburgh*, 74 Id. 657-662.

WHITWORTH *v.* THOMAS.

[83 ALABAMA, 306.]

SELLER OF HORSE WHO REPRESENTS HIM TO BE SOUND, knowing him to be unsound, and thereby misleading the purchaser, who is unable to discover the defect by ordinary observation, perpetrates a fraud which will entitle the purchaser to rescind on demand made within a reasonable time after the discovery of the fraud.

IN ACTION FOR RESCISSION OF CONTRACT FOR EXCHANGE OF HORSES on the ground of defendant's fraud, the defendant cannot set up the fraud of the plaintiff as a defense.

IN STATUTORY ACTION CORRESPONDING TO DETINUE, there can be no set-off or recoupment of damages.

ON QUESTION OF SOUNDNESS OF HORSE, it is relevant and competent to prove what kind of and how much work was done by the animal while in the purchaser's hands.

ACTION for recovery of a mule, with damages for its detention. The opinion states the facts.

R. C. Hunt and W. L. Martin, for the appellants.

J. E. Brown, for the respondents.

By Court, STONE, C. J. The present suit is a statutory action for the recovery of a chattel in specie, corresponding to the common-law action of detinue in every respect material to the decision of this appeal. Thomas exchanged with Whitworth a mule for a mare, giving and paying a small difference. About two weeks after the exchange, he tendered the mare back, and demanded a rescission, claiming that the mare was unsound when traded to him, and that he had been defrauded in the trade. Whitworth refused to receive the mare, and refused to rescind. Thomas thereupon brought this action to recover the mule. There is no contrariety of testimony bearing on the points stated above.

There is no pretense in this case that there was any warranty of the soundness of the mare. The scope of the contention is, that the mare was unsound; that the fact was known to Whitworth, but unknown to Thomas; and that, in negotiating the trade, Whitworth represented that she was sound, so far as he knew, and by means thereof induced Thomas to make the trade. If these were the facts, they armed Thomas with the right to rescind, if seasonably and properly demanded. The demand would be seasonable and proper, if he tendered the mare back with no undue delay, after discovering the deceit practiced upon him: 3 Brickell's Digest, 736, secs. 78–80; *Perry* v. *Johnson*, 59 Ala. 648; 2 Par-

sons on Contracts, bottom page, 920; 3 Wait's Actions and Defenses, 432, 455, 456. If a seller knows the horse to be unsound, and informs the buyer that he is sound so far as he knows; and the buyer, not knowing the contrary, nor able to discover it by ordinary observation, relies on such representation, and consummates the trade, this, if injury result from it, constitutes a fraud; and the buyer is authorized to rescind, if he demand it within a reasonable time after discovering the fraud.

The maxim, *In pari delicto, potior est conditio possidentis*, has no application to a case like this. That maxim applies, and only applies, where two or more are jointly concerned in the perpetration of one and the same fraud,—a conspiracy or combination to accomplish an illegal object, through fraud, by which some third person is to be the sufferer. It does not permit one independent deceit or fraud to be set off against another deceit or fraud, so as, on that account, to estop the latter from maintaining his suit. It may confer a right to a cross-action. It does not deny to either party all right to sue.

The plaintiff's right of action in this case depends on his ability to show that Whitworth had defrauded him in the exchange of the mare for the mule. The issue raised the inquiries whether the mare was unsound when the trade was made; whether Whitworth knew it; and whether he used any expression, or resorted to any artifice, with a view of concealing that fact, or of throwing Thomas off his guard. If these inquiries be answered in the affirmative, and if Thomas trusted them, and suffered injury as a consequence, this part of his complaint is made good. In the present action,—statutory detinue,—no question of recoupment or set-off could have been considered, even if it had been attempted. It was not offered to be raised by the pleadings: Code 1886, sec. 2683.

It follows, from what is said above, that any and all testimony tending to show legitimately that the mare was unsound when traded, that Whitworth knew it, and that he made any false representations in regard to it, or practiced any deceit or artifice to mislead Thomas, should have been received; and any legal testimony tending to disprove either of these propositions was also admissible. On the other hand, any proof of misrepresentation of the qualities of the mule, alleged to have been made by Thomas, was wholly immaterial. The value of the mule, and of his hire, was pertinent only as tending to furnish a basis of recovery.

All the testimony in regard to the working qualities of the mule, and in reference to Thomas's representations in relation thereto, was properly ruled out by the court; and we will not make further reference to rulings on that question.

The circuit court erred in refusing to allow the defendant to ask the plaintiff, on cross-examination as a witness, to state what work the mare had done since he traded for her. An answer to this question would have tended to prove the mare's capacity for work, and would have shed some light on the question of her soundness.

In rebuttal, plaintiff was asked by his counsel, "Did you treat the mare well or ill?" In form, the question was, perhaps, objectionable, but that furnishes no ground of reversal. In substance, the answer was but a short-hand rendering of the facts, subject to having the details called out on cross-examination, if requested. The court did not err in allowing this question to be answered.

A witness for defendant was asked, "What character of work and service is the mare performing for plaintiff at this time?" This, on motion of plaintiff, was excluded. In this the circuit court erred, for reasons stated above.

Lisle, a witness for plaintiff, was asked if he heard Mrs. Latham, one of the defendants, say anything about trading the mare. There was exception to the ruling of the court, permitting this question to be asked. The question was proper, but the answer was too remote to shed any proper light on the question at issue.

Reversed and remanded.

RESCISSION OF CONTRACTS GENERALLY: See notes to *Johnson* v. *Evans*, 50 Am. Dec. 672–681; and *Bryant* v. *Isburgh*, 74 Id. 657–662.

EFFECT OF FRAUD OR CONCEALMENT IN SALE: See notes to *Hughes* v. *Robertson*, 15 Am. Dec. 106–108; and *Barnard* v. *Duncan*, 90 Id. 425–431.

SET-OFF AND COUNTERCLAIM GENERALLY: See the notes to *Gregg* v. *James*, 12 Am. Dec. 152–157; and *Woodruff* v. *Garner*, 89 Id. 842.

RECRIMINATORY FRAUD. — The question of how far the fraud of the plaintiff may be availed of as a recriminatory defense is one which has been the subject of much discussion in the several states. The class of cases in which the question has been most frequently considered are those where deeds, conveyances, sales, and other contracts relating to the transfer of real and personal estate, have been made and entered into for the purpose of defrauding creditors, and thereafter one of the parties has sought to rescind such fraudulent executed contracts, or to enforce them when executory. As preliminary to the consideration of this question, it may be stated that although there are some exceptions, yet it is a conclusive rule of law, adjudicated by a great weight of authorities, that deeds, conveyances, contracts, and transac-

tions entered into in fraud of creditors are valid between the parties: *Jackson* v. *Cadwell*, 1 Cow. 622; *Owen* v. *Dixon*, 17 Conn. 496; *Kinnemon* v. *Miller*, 2 Md. Ch. 407; *Babcock* v. *Booth*, 2 Hill, 181; 38 Am. Dec. 578; *Sherk* v. *Endress*, 3 Watts & S. 255; *White* v. *Brocaw*, 14 Ohio St. 339; *Worth* v. *Northam*, 4 Ired. 102; *Jackson* v. *Marshall*, 1 Id. 323; 3 Am. Dec. 695; *Tremper* v. *Barton*, 18 Ohio, 418; *Crocker* v. *Crocker*, 17 How. Pr. 504; *Moore* v. *Livingston*, 14 Id. 1; *Henriques* v. *Hone*, 2 Edw. Ch. 119; *Waterbury* v. *Westervelt*, 9 N. Y. 598; *Trimble* v. *Doty*, 16 Ohio St. 118, 129; *Brown* v. *Webb*, 20 Ohio, 389; *Cushwa* v. *Cushwa's Lessee*, 5 Md. 44; *Atkinson* v. *Phillips*, 1 Md. Ch. 507, 515; *Dunnock* v. *Dunnock*, 3 Id. 140; *Douglass's Lessee* v. *Dunlap*, 10 Ohio, 162, 163; *Lessee of Simon* v. *Gibson*, 1 Yeates, 291; *Walton* v. *Tusten*, 49 Miss. 569, 575; *Snodgrass* v. *Andrews*, 30 Id. 472, 488; 64 Am. Dec. 169; *Skinner* v. *Oakes*, 10 Mo. App. 45, 50; *Jacobs* v. *Smith*, 89 Mo. 673; *Schenck* v. *Hart*, 32 N. J. Eq. 774, 781; *McMaster* v. *Campbell*, 41 Mich. 513, 516; *Gully* v. *Hull*, 31 Miss. 20; *Davis* v. *Swanson*, 54 Ala. 277; 25 Am. Rep. 678; *Crawford* v. *Lyle*, 30 Mo. App. 585; *Holt* v. *Creamer*, 34 N. J. Eq. 181, 182; *Armstrong* v. *Stovall*, 26 Miss. 275, 277; *Bush* v. *Rogan*, 65 Ga. 320; 38 Am. Rep. 785; *George* v. *Williamson*, 26 Mo. 190; 72 Am. Dec. 203; *Frink* v. *Roe*, 70 Cal. 296, 308; *Parkhurst* v. *McGraw*, 24 Miss. 134; *Gardner* v. *Short*, 19 N. J. Eq. 341; *Lokerson* v. *Stillwell*, 13 Id. 357; *Osborne* v. *Moss*, 7 Johns. 161; 5 Am. Dec. 252, and note; *Jackson* v. *Garnsey*, 16 Johns. 189, 192; *Thomas* v. *Soper*, 5 Munf. 28; *Cutler* v. *Tuttle*, 19 N. J. Eq. 549, 562; *Ogden* v. *Prentice*, 33 Barb. 160; *Finley* v. *McConnell*, 60 Ill. 259; *Isaacs* v. *Gearheart*, 12 B. Mon. 235; *Tobin* v. *Helm*, 4 J. J. Marsh. 288, 291; *Gilpin* v. *Davis*, 2 Bibb, 416, 418; 5 Am. Dec. 622; *Lemay* v. *Bibeau*, 2 Minn. 291; *Jones* v. *Rahilly*, 16 Id. 320; *Edwards* v. *Haverstick*, 53 Ind. 348; *Chapin* v. *Pease*, 10 Conn. 69; 25 Am. Dec. 56; *Anderson* v. *Dunn*, 19 Ark. 650, 659; *Piper* v. *Johnston*, 12 Minn. 60, 66; *Shealey* v. *Edwards*, 75 Ala. 411; *Coon* v. *Rigden*, 4 Col. 275, 281; *Rochelle* v. *Harrison*, 8 Port. 351; *Henry* v. *Stevens*, 108 Ind. 280; *Kelley* v. *Karsner*, 72 Ala. 106; *Anderson* v. *Brown*, 72 Ga. 713, 722; *Edwards* v. *Kilpatrick*, 70 Id. 328; *Pickett* v. *Pipkin*, 64 Ala. 520; *Eddins* v. *Wilson*, 1 Id. 237; *Lessee of Hartley* v. *McAnulty*, 4 Yeates, 95; 2 Am. Dec. 396; *Lessee of Church* v. *Church*, 4 Yeates, 280; *Tiernay* v. *Claflin*, 15 R. I. 220, 222; *Pemberton* v. *Smith*, 3 Head, 18; *Battle* v. *Street*, 85 Tenn. 282, 293; *Murphy* v. *Hubert*, 16 Pa. St. 50; *Hoeser* v. *Kraeka*, 29 Tex. 450, 453; *Kid* v. *Mitchell*, 1 Nott & McC. 334; 9 Am. Dec. 702; *Reichart* v. *Castator*, 5 Binn. 109; 6 Am. Dec. 402, and note 406; note 14 Am. Dec. 703; *Hubbs* v. *Brockwell*, 3 Sneed, 574; *Smith* v. *Grim*, 28 Pa. St. 95; 65 Am. Dec. 400, and note 401; *Abbey* v. *Commercial Bank of New Orleans*, 34 Miss. 571; 69 Am. Dec. 401, and note 405; *Williams* v. *Lowe*, 4 Humph. 62; *Jackson* v. *Marshall*, 1 Murph. 323; 3 Am. Dec. 695; *Worth* v. *Northam*, 4 Ired. 102; *Vick* v. *Flowers*, 1 Murph. 32; *Epperson* v. *Young*, 8 Tex. 135; *Stewart* v. *Iglehart*, 7 Gill & J. 132; 28 Am. Dec. 202, and note 206; *Sides* v. *McCullough*, 7 Mart. (La.) 654; 12 Am. Dec. 519; *Banks* v. *Thomas*, Meigs, 28; *Seligman* v. *Wilson*, 1 Tex. App. 896; *Eyrick* v. *Hetrick*, 13 Pa. St. 488; *Choteau* v. *Jones*, 11 Ill. 300; 50 Am. Dec. 460, and note 469; *Britt* v. *Aylett*, 11 Ark. 475; 52 Am. Dec. 282, and note 285; *Mason* v. *Baker*, 1 A. K. Marsh. 208; 10 Am. Dec. 724; *Byrd* v. *Curlin*, 1 Humph. 466; *Lynch* v. *Sanders*, 9 Dana, 59; *Dale* v. *Harrison*, 1 Bibb, 65; *Davy* v. *Kelley*, 66 Wis. 452; notes 31 Am. Dec. 484; 42 Id. 169; *Butler* v. *Moore*, 73 Me. 151; 40 Am. Rep. 348; *Clemens* v. *Clemens*, 28 Wis. 637; 9 Am. Rep. 520; *Zuver* v. *Clark*, 104 Pa. St. 222; *Sill* v. *Swackhammer*, 103 Id. 7; *Jacobi* v. *Schloss*, 7 Cold. 385; *Snodgrass* v. *Andrews*, 30 Miss. 472; 64 Am. Dec. 169, and note 175; *Telford* v. *Adams*, 6 Watts, 429.

So it is an undoubted doctrine of law and equity that such fraudulent deed vests the title absolutely in the grantee, and gives to him a legal and perfect estate, except as to those persons actually defrauded by the transaction, since such conveyance passes as valid a title as if it were *bona fide* and for a full and adequate consideration: *Zuver* v. *Clark*, 104 Pa. St. 222; *Sill* v. *Swackhammer*, 103 Id. 7; *Lynch* v. *Sanders*, 9 Dana, 59; *Chapin* v. *Pease*, 10 Conn. 69; 25 Am. Dec. 56; *Jackson* v. *Garnsey*, 16 Johns. 189, 192; *Parkhurst* v. *McGraw*, 24 Miss. 134; *Skinner* v. *Oakes*, 10 Mo. App. 45, 50; *Jacobs* v. *Smith*, 89 Mo. 673; *McMaster* v. *Campbell*, 41 Mich. 513, 516; *Lemay* v. *Bibeau*, 2 Minn. 291; *Moore* v. *Livingston*, 14 How. Pr. 1; *Waterbury* v. *Westervelt*, 9 N. Y. 598; *Henriques* v. *Hone*, 2 Edw. Ch. 119; *Crocker* v. *Crocker*, 17 How. Pr. 504; and this rule is said to hold true although no consideration was paid or possession given: *Hoeser* v. *Kraeka*, 29 Tex. 450, 453; *Chapin* v. *Pease*, 10 Conn. 69; 25 Am. Dec. 56; in this last case the conveyance was voluntary. But in *Tierney* v. *Claflin*, 15 R. I. 220, the rule was qualified and there limited to innocent grantees, though the case was not argued so far as the limitation was concerned: See also *Newell* v. *Newell*, 34 Miss. 385; and it was said in *Hess* v. *Final*, 32 Mich. 516, that such a conveyance may be good between the parties when based on a valid consideration. The court, however, although not directly making the distinction there between those cases where a consideration exists and those where the conveyance is voluntary, impliedly intimates that such a distinction exists. So a similar distinction is made in Georgia between those cases where the conveyance is voluntary and where the whole consideration was paid: *Bush* v. *Rogan*, 65 Ga. 320; 38 Am. Rep. 785. The illustration of this in *Goodwyn* v. *Goodwyn*, 20 Ga. 600, being that if A sells property to B to defeat a third party, and such property is paid for by B, this entitles B to sue for and recover it from A; not so, however, if B paid nothing as a consideration. If B obtained possession he can hold it as against A and those holding as volunteers under him, although if he failed to get possession the court will refuse its aid to compel the execution of the covinous contract.

HEIRS, PRIVIES, ASSIGNS, ETC., HOW FAR BOUND. — Such fraudulent deed is equally binding upon the grantor, his heirs, privies, assigns, and those claiming under him: *Reichart* v. *Castator*, 5 Binn. 109; 6 Am. Dec. 402, and note 406; *Mason* v. *Baker*, 1 A. K. Marsh. 65; 10 Am. Dec. 724; *Skinner* v. *Oakes*, 10 Mo. App. 45, 50; *Jacobs* v. *Smith*, 89 Mo. 673; *Dale* v. *Harrison*, 4 Bibb, 65; *Crawford* v. *Lyle*, 3 Mo. App. 585; *Finley* v. *McConnell*, 60 Ill. 259; *Horner* v. *Zimmerman*, 45 Id. 14; *Lyons* v. *Robbins*, 46 Id. 276; *Fitzgerald* v. *Forristal*, 48 Id. 228; *Bush* v. *Rogan*, 65 Ga. 320; 38 Am. Rep. 785; *Anderson* v. *Brown*, 72 Ga. 713, 722; *Edward* v. *Kilpatrick*, 70 Id. 328; *Battle* v. *Street*, 85 Tenn. 282, 293; *Murphy* v. *Hubert*, 16 Pa. St. 50; note 14 Am. Dec. 703; *Kid* v. *Mitchell*, 1 Nott & McC. 334; 9 Am. Dec. 702; *Smith* v. *Grim*, 28 Pa. St. 95; 67 Am. Dec. 400; *Tremper* v. *Barton*, 18 Ohio, 418; *Terrel's Heirs* v. *Cropper*, 9 Mart. (La.) 350; 13 Am. Dec. 309; *Cushwa* v. *Cushwa's Lessee*, 5 Md. 44.

EXECUTED AND EXECUTORY CONTRACTS. — Although the courts with few exceptions have decided that conveyances and contracts made and entered into in fraud of creditors are valid and binding between the parties, yet an examination of the cases discovers that the application of this principle has been the real source of controversy, especially in regard to executory contracts. As elucidating this point, and arriving at a determination of the governing rule, it will be eminently proper to consider some of the several cases wherein the question has been discussed. The case of *Clemens* v. *Clemens*, 28 Wis. 637, 9 Am. Rep. 520, is a leading case in Wisconsin.

There the plaintiff and the defendant entered into an arrangement whereby the former, for the purpose of defrauding his creditors, was to convey to the defendant, without consideration, a certain tract of land, the defendant agreeing to reconvey the same on request. In considering the question, the court refers to the cases of *Dyer* v. *Homer*, 22 Pick. 253, and *Harvey* v. *Varney*, 98 Mass. 118, and also to the earlier Massachusetts cases as determining the principle which should govern it in its conclusions, and says: "In that state, a conveyance or sale of property made with intent to hinder or defraud the creditors of the grantor or seller, if executed in due form of law, is good and effectual to pass the title to the grantee or vendee, because, as between the parties to it, it was fairly, deliberately, and intentionally executed and delivered. The grantor or seller may not claim relief, or the right to rescind or set aside the conveyance or transfer, on the ground that no consideration was paid or agreed to be. He may be concluded from doing this by reason of his fraud, but more likely for other sufficient reasons. All other remedies, however, are open to him as against the grantee or purchaser, subject, of course, to such defenses as may have arisen in favor of the latter by the action of creditors or purchasers, who may at any time avoid the conveyance or transfer. If the grantee or vendee has given his promissory note in consideration of the conveyance or transfer, or entered into any other promise or obligation, in other respects sufficient to pay for the property, the grantor or seller may enforce the same, or recover damages for the breach by his appropriate action at law, or if the nature of the complaint or cause of action be such as remediable only in equity, he may file his bill in that court, and relief will be granted in the same manner and to the same extent as between other parties to contracts or agreements not affected by the element of fraud or delay with respect to the claims of creditors or others. The doctrine of *par delictum* has no application between the contracting parties, the conveyance or contract being considered illegal or void, only so far as it is declared so by the statute"; and the court cites also, as sustaining the doctrine advocated by it, *Nichols* v. *Patten*, 18 Me. 231; 36 Am. Dec. 713; *Andrews* v. *Marshall*, 43 Me. 472; 48 Id. 26; *Osborne* v. *Moss*, 7 Johns. 161; 5 Am. Dec. 252; *Jackson* v. *Garnsey*, 16 Johns. 189; *Findley* v. *Cooley*, 1 Blackf. 262; *Scott* v. *Purcell*, 7 Id. 66, 68; 39 Am. Dec. 453; *Moore* v. *Meek*, 20 Ind. 484; *Springer* v. *Drosch*, 32 Id. 486; 2 Am. Rep. 356; *Horser* v. *Kraeka*, 29 Tex. 450; *Davis* v. *Ransom*, 26 Ill. 105; *Lawton* v. *Gordon*, 34 Cal. 36; 91 Am. Dec. 670. The later cases in Wisconsin, — *Davy* v. *Kelley*, 66 Wis. 452, 457; *Melhop* v. *Pettibone*, 54 Id. 652, 657; *Dietrich* v. *Koch*, 35 Id. 618; *Hardy* v. *Stonebreaker*, 31 Id. 647; and *Sutton* v. *Wauwatosa*, 29 Id. 21, 32; 9 Am. Rep. 534, — although citing *Clemens* v. *Clemens*, *supra*, to the extent that the contract is valid between the parties, do not seem to agree upon the application of that doctrine. The case in 29 Wis. 32, declares that for consistency the ruling in *Clemens* v. *Clemens*, *supra*, should be followed. But the court in 31 Wis. 647, while citing that case, says the maxim is too well established in law to admit of controversy, that a court of justice will not, as a rule, "interfere between parties equally guilty, to adjust their controversies and apportion the shares to which they are respectively entitled, accruing from a fraudulent, illegal, or immoral enterprise." *Dietrich* v. *Koch*, *supra*, simply holds that such fraudulent contracts are valid and binding between the parties; while *Melhop* v. *Pettibone*, *supra*, holds that a fraudulent grantor may not reclaim lands from his fraudulent grantee, relying upon the same doctrine stated in *Clemens* v. *Clemens*, *supra;* viz., that such conveyance is valid between them, although it will be observed that a

different application of the rule is there made. But the case of *Davy* v. *Kelley*, *supra*, sustains that of *Clemens* v. *Clemens*, *supra*, by a direct application of the doctrines therein considered.

The oft-cited case of *Nellis* v. *Clark*, 20 Wend. 24, decides that no recovery can be had upon a note given as a part consideration for a fraudulent conveyance of land; that a promise to pay for property purchased with the intention to defraud creditors will not be enforced. The court, *arguendo*, says: "I lay out of view the failure of consideration, because I agree that such a purchaser would never be protected on his own account. He would be esteemed guilty of a crime against social policy; and though he had paid the most ample consideration, he could not recover it back"; and the rule was declared to be the same "whether the act be declared fraudulent at the common law or by statute, and the same at law as in equity," fraud of this character being there declared to be so both at common law and by the statute; and that, whether the contract be executed or executory, no aid will be given either party, — an executed contract being binding between the parties, and an executory one being in effect a nullity, so that the contractor may not be compelled to perform his agreements or pay damages for its non-performance. The dissenting opinion of the chief justice in this case has, however, been followed in some of the cases, as will be seen in this note. In this dissenting opinion, a distinction is made between executed and executory contracts; and it is argued that a recovery could be had upon the note in suit upon the ground that such a contract is valid and legal as between the parties themselves. In *Chamberlain* v. *Barnes*, 26 Barb. 160, 162, the decision in *Nellis* v. *Clark*, *supra*, is affirmed, and the doctrine applied to the effect that a bond and mortgage executed for the purchase-money for a fraudulent conveyance could not be enforced, although the plaintiff obtained them from the party to the original covinous transaction. The claim was made in this case "that the plaintiff, in respect to his mortgage, [stood] in the position of a grantee of the premises; and even if the mortgage [was] fraudulent, the defendants" could not dispute its validity. The court ruled, however, that "this would be so if the mortgage conveyed the title to the land, and it became vested in the plaintiff by the assignment. The law would then, as to the parties and privies, and all claiming under them or either of them by grant or assignment, leave the title where the fraudulent act had placed it. But a mortgage upon real estate has no such effect; it is a mere lien upon the land, and is security for the debt, and carries no title. . . . . The bond, which is the debt, is clearly an executory contract, and the mortgage, being but a security for the debt, partakes of the same character."

Again, the application of the doctrine that such a conveyance is valid between the parties is limited to executed contracts, in *Moseley* v. *Moseley*, 15 N. Y. 334, 335, where the court says: "It was formerly understood to be the law that contracts and conveyances made with a view to delay, hinder, or defraud creditors were, nevertheless, valid and binding between the parties to such contracts and conveyances. . . . . In *Nellis* v. *Clark*, 20 Wend. 24, the rule was departed from by a decision which restricted the doctrine to executed conveyances, the court holding that an executory agreement entered into in fraud of creditors could not be enforced between the parties; conceding, however, that the principle which I have stated applied universally to grants and conveyances, and all executed contracts. The court applied to transactions fraudulent against creditors the rule which prevails as to other illegal contracts, namely, that whatever the parties have illegally contracted to execute, neither can by law compel the other to execute, or to pay dam-

ages for not executing; and that, as to conveyances and executed contracts, it refuses to aid either party, but leaves them where it finds them. This modification of the law as it was finally held, having received the sanction of the court of errors, should now be considered as established."

Briggs v. *Merrill*, 58 Barb. 389, 399, was another case where it was sought to enforce the payment of a promissory note given in part performance of such fraudulent transaction, and the court refused to aid the plaintiff in its collection, relying upon *Nellis* v. *Clark*, *supra*. And it also held, in *Mackie* v. *Cairns*, 5 Cow. 547, 15 Am. Dec. 477, that the parties to such fraudulent conveyance will not be permitted to deny its validity. Nor may such fraudulent grantor maintain a suit to set aside such a conveyance, although the conveyance was made by the advice of the grantee, with whom the plaintiff was very intimate, and in whom he reposed great confidence, although a distinction was made between such a case and one where the grantee was a legal adviser: *Renfrew* v. *McDonald*, 11 Hun, 254. And where there has been a fraudulent transfer of personal property, the law cannot be invoked to aid either, because the title by such act is vested absolutely in the transferee, even though he was a party to the fraud: *Crocker* v. *Crocker*, 17 How. Pr. 504. So in *Henriques* v. *Hone*, 2 Edw. Ch. 119, it is said that the grantor may not impeach such fraudulent grant of land since the court will refuse to set it aside as a nullity between the parties. But in *Sweet* v. *Finslar*, 52 Barb. 271, it was held that an action to compel an accounting by the defendant, and a reconveyance by him of real estate so fraudulently conveyed to him under a trust agreement entered into for the plaintiff's benefit, could not be sustained, it being there said that the doctrine is well settled that a court of equity will not set aside such an agreement, and that, being *particeps criminis*, neither party will be relieved as against the other from the consequences of such covinous acts. Although it was declared that "if there had been a promise on the part of the defendant to render an account, or to pay the plaintiff for moneys received, or an agreement subsequently made for a valuable consideration to reconvey the lands, then perhaps the action might be maintainable."

And in *Jackson* v. *Garnsey*, 16 Johns. 189, 192, it was decided that where property was so fraudulently conveyed under an agreement for a reconveyance, although voluntary and without any consideration, that the parties were as much bound as though a *bona fide* and valuable consideration had been paid, and that neither at law or in equity would such conveyance be set aside.

In Maine, the case of *Butler* v. *Moore*, 73 Me. 151, 40 Am. Rep. 348, holds that in an action on a note against the maker thereof, and which was given as the consideration of a conveyance made in fraud of creditors, the fraud may not be availed of as a defense. The court there says: "It is generally true that the law will not aid parties violating its express or implied rules in executing their unlawful contracts, or afford them relief from their effects when executed. In such cases, the old maxims, *ex turpi* and *in pari delicto*, stand like walls against the parties." It then declares that such fraudulent conveyance is valid between the parties, and adds: "If valid, we fail to see why the note given in payment is not also valid. The transaction is not a *turpis causa*, and neither do the parties stand *in pari delicto*. . . . . The decisions in Massachusetts sustain actions like this"; and it relies upon the cases of *Dyer* v. *Homer*, *Harvey* v. *Varney*, cited *ante*; *Butler* v. *Hildreth*, 5 Met. 49, 50; *Bailey* v. *Foster*, 9 Pick. 139; *Clemens* v. *Clemens*, 28 Wis. 637; 9 Am. Rep. 520; *Carpenter* v. *McClure*, 39 Vt. 9; 91 Am. Dec. 370. Finally, however, the court, without directly overruling the prior cases in its own state

which are *contra*, argues as follows: "We are aware that the early decisions in our own state are somewhat inconsistent: *Smith* v. *Hubbs*, 10 Me. 71; *Nichols* v. *Patten*, 18 Id. 231; 36 Am. Dec. 713; *Ellis* v. *Higgins*, 32 Me. 34; *Andrews* v. *Marshall*, 48 Id. 26. But in none of these cases was this precise question presented, although it was discussed. We think, however, the better doctrine is the one held by the cases above cited."

In another leading case, *Drinkwater* v. *Drinkwater*, 4 Mass. 355, 360, it was ruled that where land is so fraudulently conveyed, that only for the benefit of creditors can the covinous transaction be shown, and that neither the grantor nor his heirs can impeach for fraud a conveyance to which he was a party. The case of *Dyer* v. *Homer*, 22 Pick. 253, is, if not *contra*, certainly not consistent with the reasoning in this case, since it was there held that there was no reason why a non-negotiable promissory note given as the consideration of a fraudulent sale of personal property should not be enforced in the name of the promisee for the benefit of the assignee. It will be observed that in this case a distinction is apparently made between notes given without and those which are supported by a consideration; and in *Harvey* v. *Varney*, 98 Mass. 118, it was held that it made no difference whether the contract was executed or executory; it was good and valid between the parties, although the parties were *in pari delicto*, and judgment was given in that case for the plaintiff, the action being a bill in equity for the settlement of partnership accounts; and the court argued that the defendants could not be permitted to set up in defense that the purpose of forming the partnership was to defraud creditors, and cites *Dyer* v. *Homer*, *supra*, as a precedent, although it is said that such fraudulent conveyance is good, and stands between the parties: Id. 120. The case of *Nellis* v. *Clark*, 20 Wend. 24, is referred to as sustaining an adverse doctrine, but the court, notwithstanding, adopts the dissenting opinion in that case of Chief Justice Nelson, "the reasoning and conclusions of which," it says, "commend themselves to our judgment in preference to the opinion of the majority of that court." The case of *Canton* v. *Dorchester*, 8 Cush. 525, is criticised at at length, and it was declared that "the question whether a contract to reconvey an estate could be avoided by proving that it and the deed were both given to cover up the property from attachment, was not distinctly presented to the court nor involved in the case under examination. We cannot suppose that it was intended in an incidental and summary manner to overrule the entire current of authorities"; and the court adds that although in that case it was decided that no court of law or equity would, upon the application of the grantor, enforce an executory contract founded on a fraudulent transaction, yet the gist of the ruling was merely a statement of the "general doctrine that the discretionary power of a court of chancery to enforce specific performance will not be exercised where the plaintiff has been guilty of fraud"; that the position that a court of law would not sustain an action on such a contract was not upheld by any authorities there cited, and was a remark not necessary to the decision in that action. The case of *Harvey* v. *Varney*, *supra*, and *Dyer* v. *Homer*, *supra*, being the latest cases, may — however questionable — undoubtedly be held as the decisive ones in Massachusetts.

So in *Walton* v. *Tusten*, 49 Miss. 569, 576, it is determined that "there is a distinction between an executed and an executory fraudulent contract. As to the latter, the court, where the parties are equally participants in the fraud, — *in pari delicto*, — will leave them in the predicament where they place themselves, by denying any relief or interference. But where the contract is

executed, ... the court acts upon the same principle, declining altogether to cancel the deed, and restore the title to [the grantor]. But the effect is very different: in the former case, specific performance will be refused; in the latter, the fraudulent grantee remains owner of the estate against the grantor and his heirs, and against all other persons except the creditors of the grantor. . . . . The estate in the fraudulent grantee is complete, and fully vested, so that it is subject to sale and conveyance, or to descent; the title cannot be impugned by covin and collusion, in which it was contrived and transferred, by any other person except those injured by the deceit and fraud; no other person can assail the conveyance except the creditors (of the grantor). . . . . The rights of the immediate parties are left to be dealt with by the common law. *Ex turpi causa non actio oritur*, — a party applying to a court of equity for relief must have an honest and just claim. To extend aid to either party engaged in a conspiracy to cheat and defraud would be to sanction the wrong, and carry it to a successful consummation; therefore equity will not decree a specific performance of an agreement by the fraudulent grantee to reconvey the property to the debtor." So the fraudulent grantor cannot maintain a suit to set aside such fraudulent conveyance, nor may he recover on the ground of fraud the property so conveyed: *Snodgrass* v. *Andrews*, 30 Miss. 472, 488, 64 Am. Dec. 169; since he will not be permitted to impeach his deed: *Newell* v. *Newell*, 34 Miss. 385; nor will the courts interfere between parties *in pari delicto*: *Watt* v. *Conger*, 13 Smedes & M. 412, 421. But in *Gary* v. *Jackson*, 55 Miss. 204, 30 Am. Dec. 514, and note 517, we find the doctrine that in an action for the price of goods sold and delivered, the defendant cannot avoid payment on the ground that the sale was in fraud of the seller's creditors.

Again, it is decided, in Pennsylvania, that an agreement that a judgment note should be held until the maker became embarrassed, and then be entered, and his real estate sold for the benefit of his wife, was a contract intended to hinder, delay, and defraud creditors, and that such agreement could not be enforced, and that neither one party nor the other could set up the fraud, as between themselves, to defeat the other party of any claim under it. "A party to such a transaction cannot give in evidence his own fraud in defense against his own act, whether it be an absolute deed or a mortgage, or a confession of judgment, no matter how it may be mingled with other arrangements or agreements between the parties." And the court also says that such fraudulent deed "is valid as against the grantor and those for whose benefit it is designed. . . . . That a trust cannot be enforced where it is designed to effect a fraud on creditors, is settled by authority. The cases, without exception, decide that such a trust is void in itself, and therefore incapable of being made the foundation of a right in others": *Shank* v. *Simpson*, 114 Pa. St. 208, 212, relying on *Serfross* v. *Fisher*, 10 Id. 185; *Williams's Adm'x* v. *Williams*, 34 Id. 312; *Murphy* v. *Hubert*, 16 Id. 57; *Blystone* v. *Blystone*, 51 Id. 273.

In another case in Pennsylvania, — that of *Bonesteel* v. *Sullivan*, 104 Pa. St. 9, 14, — it was determined that if a mortgagee who seeks to recover on a mortgage made with intent to defraud the creditors of the mortgagor can make out his case without resorting to the fraudulent transaction, he is not precluded from recovering in a suit upon the mortgage, since in such action the defendant cannot set up the fraud as a defense, the mortgage having *prima facie* been executed in good faith and for a valuable consideration. The court said that the plaintiff, "though a participant in the fraud, has this advantage over the defendant, — he is not obliged to resort to the fraudulent

transaction to make out his case"; that the mortgagor, "as the very first step in his defense, is obliged to exhibit his own fraud, hence he cannot gain the ear of the court, for, on all authority, the court will not aid or abet a party who comes into it with a dishonest case"; and it adds that such a mortgage is good as between the parties to it.

So in *Dansels* v. *Fitch*, *Hale* v. *Fitch*, 8 Pa. St. 495, the rule is declared to be that a defendant in replevin may not avail himself of the defense of fraud in an action to recover personal property, or its value, since such transaction is valid between the parties and may be enforced. It is also decided that such fraudulent contract for the sale of goods is valid between parties, although void as to creditors, and the court will enforce the same: *Telford* v. *Adams*, 6 Watts, 429.

And again, that trover will not lie to recover the possession of personal property which the plaintiff has parted with for the purpose of defrauding his creditors: *Stewart* v. *Kearney*, 6 Watts, 453; 31 Am. Dec. 482, and note 484.

So upon the ground that such fraudulent transaction is valid between the parties, it is determined in *Winton* v. *Freeman*, 102 Pa. St. 366, 369, that the maker of a note fraudulent in its inception cannot set up his fraud as a defense against the payee to prevent its collection, the court saying that "it is settled by numerous authorities that there is no more binding consideration known to the law than the mutual fraud of the parties. The books are full of cases where a party to the fraud has sought relief in the courts from the consequences of his unlawful act, but the decisions have been uniformly adverse to such applications. It is not the province of the law to help a rogue out of his toils. The rule is to leave the parties where it finds them, giving no relief and no countenance to contracts made in violation of statutes." "A person cannot profit by his fraud. He cannot use it to acquire any rights, or to protect himself against any claim": *Brown* v. *Scott*, 51 Pa. St. 357, 365.

In keeping with the above decisions in this state, to the effect that a party cannot set up his own fraud to avoid any instrument or contract executed or entered into by him, and that equity will refuse relief to one who, in seeking its aid, discloses his own turpitude in the very contracts on which his action depends, we find the following additional cases: *Kunkle's Appeal*, 107 Pa. St. 368; *Pringle* v. *Pringle*, 59 Id. 281, 286; *Lessee of Simon* v. *Gibson*, 1 Yeates, 291; *Reichart* v. *Castator*, 5 Binn. 109, 112; 6 Am. Dec. 402; *Sickman* v. *Lapeley*, 13 Serg. & R. 224; 15 Am. Dec. 596, and note 599; *French* v. *Mehan*, 56 Pa. St. 286; *Stewart* v. *Kearney*, 6 Watts, 453; 31 Am. Dec. 482. The reasons given in *Sherk* v. *Endress*, 3 Watts & S. 255, for sustaining the doctrine above stated, in regard to executory contracts, are, that "the statute does not operate in a contest betwixt the actors themselves on what it declares to be fraud only in its relation to third persons; for in any other aspect there is no fraud whatever, and it is unimportant whether the contract is used to found a claim betwixt the parties to it, or to rebut one; it is free from taint in regard to them, and the one may use it against the other for any purpose whatever. The reason why a contract void against creditors may be set up against either of the parties to it is not because he shall not be allowed to defeat it by showing his own criminality, but because there is no criminality to be shown. It is a trite remark that though a contract within the purview of the statute is no contract at all against the interests intended to be defrauded, yet it is a contract in respect to everything else, and consequently it must have all the effect of one betwixt the parties to it. . . . . The principle I have indicated arises from no provision of the statute, for a contract

infected with actual fraud against a third person not a creditor is, by the policy of the law, enforceable even in equity between those who intended to perpetrate the act."

In Iowa, it is decided, in the case of *Jones* v. *Farris*, 70 Iowa, 739, that neither a grantor nor his fraudulent creditor can have relief in a court of equity to set aside a deed made for the purpose of defrauding creditors, although there was a secret agreement to reconvey. The question was not discussed, however, the case being only a mere *dictum* to the above effect. This case is in keeping with those of *Kervick* v. *Mitchell*, 68 Id. 273; *Weir* v. *Day*, 57 Id. 84, 86; *Mellen* v. *Ames*, 39 Id. 283; *Wright* v. *Howell*, 35 Id. 288; *Harlin* v. *Stevenson*, 30 Id. 371; *Holliday* v. *Holliday*, 10 Id. 200. Nor will a court of chancery compel a reconveyance for the purpose of enforcing a trust between the parties: *Stephens* v. *Heirs of Harrow*, 26 Id. 458, 465; and "while equity will not interfere to set aside such a deed between the parties or their heirs, it is also true that it will not lend its aid to enable parties to consummate their dishonest purposes. . . . . Equity will not rectify or in any manner recognize a voluntary instrument which does not complete the transfer of the property. . . . . As equity abhors fraud, there are still stronger reasons why it should not interfere to correct a deed executed without consideration and for a fraudulent purpose": *Gebhard* v. *Sattler*, 40 Id. 152, 154. In this last case, it was sought to correct a mistake in a deed made in fraud of creditors; but there were no creditors in fact. Here, although the grantor believed that an old claim might be prosecuted against him, and the grantee had encouraged such belief, and the conveyance had been made, it was held that a recovery might be had against the grantee of the property itself or of its value: See *Kervick* v. *Mitchell*, 68 Id. 273.

In Illinois, the doctrine is laid down that courts will not aid parties to regain property fraudulently conveyed, but will leave them where they find them: *Songer* v. *Partridge*, 107 Ill. 529, 533. But in the case of *Second National Bank* v. *Brady*, 96 Ind. 498, it is said that "there is an important difference between setting aside a conveyance made to defraud creditors at the suit of the fraudulent grantor and the enforcement of notes or mortgages executed in the course of the fraudulent transaction. The cases of *Garner* v. *Graves*, 54 Ind. 188, *Edwards* v. *Haverstick*, 53 Id. 348, and *Laney* v. *Laney*, 2 Id. 196, decide that a fraudulent conveyance cannot be avoided by the grantor. *Van Wy* v. *Clark*, 50 Id. 259, and *O'Neil* v. *Chandler*, 42 Id. 371, following without investigation the case of *Springer* v. *Drosch*, 32 Id. 486, 2 Am. Rep. 356, decide that notes and mortgages executed by the fraudulent grantor to his fraudulent grantee may be enforced, while *Welby* v. *Armstrong*, 21 Ind. 489, decides the question exactly the other way. It seems that *Springer* v. *Drosch*, *supra*, is opposed to the familiar rule that courts will not aid either party to enforce a contract founded in fraud, but it will leave them where it found them; it certainly is in conflict with the great weight of authority; and the court relies upon the cases of *Nellis* v. *Clark*, 4 Hill, 424; *Moseley* v. *Moseley*, 15 N. Y. 334; *Mason* v. *Baker*, 1 A. K. Marsh. 208; 10 Am. Dec. 724; *Norris* v. *Norris*, 9 Dana, 317; 35 Am. Dec. 138; *Randall* v. *Howard*, 2 Black, 585; *Fox* v. *Gardner*, 21 Wall. 475; *Hamilton* v. *Scull*, 25 Mo. 165; 69 Am. Dec. 460; *McCausland* v. *Ralston*, 12 Nev. 195; 28 Am. Rep. 781; *Miller* v. *Marckle*, 21 Ill. 152; *Heineman* v. *Newman*, 55 Ga. 282; 21 Am. Rep. 279; *McQuade* v. *Rosecrans*, 36 Ohio St. 442; *Wearse* v. *Peirce*, 24 Pick 140." Further than this statement, however, the court does not go, and does not directly overrule *Springer* v. *Drosch*, *supra*. The decision of *Seivers* v. *Dickover*, 101 Ind. 495, follows the case of *Second National Bank* v. *Brady*, *supra*. But

unless these last two decisions may be held to impliedly overrule *Springer* v. *Drosch*, *supra*, that case stands as law in Indiana, since it directly overrules *Welby* v. *Armstrong*, 21 Ind. 489, and is followed, as above stated, by *Van Wy* v. *Clark*, *supra*, and *O'Neil* v. *Chandler*, *supra*. The cases of *Nellis* v. *Clark*, 4 Hill, 424; *Mason* v. *Baker*, 1 A. K. Marsh. 208, 10 Am. Dec. 724, and *Norris* v. *Norris*, 9 Dana, 317, 35 Am. Dec. 138, directly relied on in *Second National Bank* v. *Brady*, *supra*, are declared in *Springer* v. *Drosch* to find no support in the principles of the common law, and are said not to be sustained by a single authority. This last case relies upon *Drinkwater* v. *Drinkwater*, 4 Mass. 354; *Taylor* v. *Weld*, 5 Id. 109; *Reichart* v. *Castator*, 5 Binn. 109; 6 Am. Dec. 402; *Gillespie* v. *Gillespie*, 2 Bibb, 89; *Dale* v. *Harrison*, 4 Id. 65; *Clapp* v. *Tirrill*, 20 Pick. 247; *Dyer* v. *Homer*, 22 Id. 253; *Sherk* v. *Endress*, 3 Watts & S. 255; *Randall* v. *Phillips*, 3 Mason, 378; *Byrd* v. *Curlin*, 1 Humph. 466; *Thompson* v. *Moore*, 36 Me. 47; *Eyrick* v. *Hetrick*, 13 Pa. St. 488; *Burgett* v. *Burgett*, 1 Ohio, 469; 13 Am. Dec. 634; *Worth* v. *Northam*, 4 Ired. 102; *Hendricks* v. *Mount*, 5 N. J. L. 738; 8 Am. Dec. 623; *Robinson* v. *Monjoy*, 5 N. J. L. 173; *Sumner* v. *Murphy*, 2 Hill (S. C.), 488; 32 Am. Dec. 397; *Chapin* v. *Pease*, 10 Conn. 69; 25 Am. Dec. 56; *Dearman* v. *Radcliffe*, 5 Ala. 192; *McGuire* v. *Miller*, 15 Id. 394; *Nichols* v. *Patten*, 18 Me. 231; 36 Am. Dec. 713; *Fairbanks* v. *Blackington*, 9 Pick. 93.

The case of *Seivers* v. *Dickover*, 101 Ind. 495, 498, holds that the court will refuse to refund to such fraudulent grantee the amount paid by him in the transaction, although it has gone to the creditors of the failing debtor, since the law uniformly leaves the parties to such fraudulent transactions exactly where it finds them. And in *Edwards* v. *Haverstick*, 53 Id. 348, it is said that an execution against a grantee can be levied on land so fraudulently conveyed to him.

In California, the decisions seem to conflict, since in *Davis* v. *Mitchell*, 34 Cal. 82, it was held, in an action on a note given in fraud of creditors, and which was bought at an execution sale of the property of the payee, that he could neither allege nor prove that the transaction upon which such note was based was fraudulent; that the courts would listen neither to such a defense nor to an action to recover back property so fraudulently transferred, citing *Abbe* v. *Marr*, 14 Cal. 210; *Valentine* v. *Stewart*, 15 Id. 387; *Gregory* v. *Haworth*, 25 Id. 653.

But in *Ager* v. *Duncan*, 50 Cal. 325, 327, where the contract was executory, and a suit was brought to enforce the payment of a note given with a fraudulent intent of concealing the actual ownership of property from creditors, and it appeared that the parties were *in pari delicto*, the court said: "In such cases it is immaterial by which of the parties the fraudulent nature of the contract is disclosed to the court; as soon as the fraud is made to appear by either of the parties, the court will refuse to interfere, and will leave them as they were. It will not enforce a contract founded on the mutual turpitude of the parties to it; and for the same reason, if the contract has been executed the court will not aid either party to escape its consequences."

Courts will enforce, in Texas, a fraudulent conveyance of real or personal estate against the grantor, as where chattels or land have been sold and granted, but the vendor or grantor has remained in possession; in such cases a suit may be maintained by the fraudulent grantee for recovery of the same, nor can the grantor of such fraudulent deed impeach it. "It has universally been held that wherever the conveyance was completed, either by the actual or constructive delivery of the property, the grantee was entitled to recover, though the grantor was in possession of the property at the commencement

of the suit, and had been continuously so from the date of the conveyance": *Hoeser* v. *Kraeka*, 29 Tex. 453, 454; see also *Seawell* v. *Lowery*, 16 Id. 47, 59. A distinction is impliedly made in *Hoeser* v. *Kraeka*, *supra*, between executed and executory contracts.

In *Carpenter* v. *McClure*, 39 Vt. 9, 91 Am. Dec. 370, it is determined that a note having its inception under a contract fraudulent as to creditors may be enforced against the makers, notwithstanding the fraud. The case of *Nellis* v. *Clark*, 20 Wend. 24, is considered, and the distinction there made between executory and executed contracts is held not in keeping with the decisions of the Vermont courts: *Martin* v. *Martin*, 1 Vt. 91; 18 Am. Dec. 675; *Gifford* v. *Ford*, 5 Vt. 532; *Conner* v. *Carpenter*, 28 Id. 240; *Boutwell* v. *McClure*, 30 Id. 676; *Seaver* v. *Price*, 42 Id. 325; *Roberts* v. *Lund*, 45 Id. 82. In the last case, it was said that the law will not permit a party to allege his own fraud to avoid his contract or the legal consequences of his own acts: 45 Id. 87; and see *Peaslee* v. *Barney*, 1 D. Chip. 331; 6 Am. Dec. 743.

In Tennessee, the courts equally refuse to aid either party to such fraudulent agreements, deeds, and transfers of property, and refuse to rescind such fraudulent conveyance, or to enforce such convinous agreements, as where a note is given for real property where a pretended sale is made to defraud creditors, no recovery can be had: *Parkes* v. *McKaney*, 3 Head, 297; *Hamilton* v. *Gilbert*, 2 Heisk. 680; *Walker* v. *McConico*, 10 Yerg. 228. In this last case the note was without consideration: *Battle* v. *Street*, 85 Tenn. 282, 293; *Shaw* v. *Carlile*, 9 Heisk. 594; *Swan* v. *Castleman*, 4 Baxt. 257, 269; so where one holding a note surrenders it to another in order to delay and defraud creditors, under an agreement to account for said note, no court will aid the party in recovering the same, since "the courts will not, as between the parties, take cognizance of such a fraudulent transaction, nor interpose, at the instance of either, for any purpose whatever": *Mulloy* v. *Young*, 10 Humph. 297. Such fraudulent sale is binding upon the parties in Arkansas, and may not be rescinded or enforced: *Britt* v. *Aylett*, 11 Ark. 475; 52 Am. Dec. 282, and note 285; *Anderson* v. *Dunn*, 19 Ark. 650, 659.

In West Virginia, where, under a contract, something fraudulent or opposed to public policy, is agreed to be done, and the parties are in *pari delicto*, the court will, as a general rule, refuse to enforce such a contract: *Horn* v. *Star Foundry Co.*, 23 W. Va. 522, 533.

The doctrine that neither party to a fraudulent conveyance can be aided in a court of justice, but that they will be left in exactly that position in which they have placed themselves by their covinous and fraudulent transactions, and that the fraudulent grantor may not be permitted to impeach his deed, or to revoke or rescind such executed contract, is followed in North Carolina: *Ellington* v. *Currie*, 5 Ired. Eq. 21; *Waller* v. *Mills*, 3 Dev. 515, 519; *Jones* v. *Gorman*, 7 Ired. Eq. 21, 23; *Bynum* v. *Miller*, 86 N. C. 559, 562; 41 Am. Rep. 467; and this rule was extended, in that state, to a case where a party, at the suggestion and advice of his attorney, conveyed land to him with the intent to defraud his creditors, the court refusing to grant any relief: *York* v. *Merritt*, 80 N. C. 285; so in South Carolina: *Kidd* v. *Mitchell*, 1 Nott & McC. 334; 9 Am. Dec. 702; and the same rule obtains in New Jersey: *Cutler* v. *Tuttle*, 19 N. J. Eq. 549, 562; *Holt* v. *Creamer*, 34 N. J. Eq. 181, 182; *Evans* v. *Herring*, 27 N. J. L. 243; nor may such fraudulent grantor invoke the aid of a court, "either directly or indirectly (as by a suitor in the guise of a creditor), to recover the control of the property, or direct the disposition of it in any form": *Ruckman* v. *Conover*, 37 N. J. Eq. 583, 585; the rule is also followed in Kentucky: *Martin* v. *Martin*, 5 Bush, 47; *Norris* v. *Norris's*

Adm'r, 9 Dana, 318; 35 Am. Dec. 138; *Jones* v. *Read*, 3 Dana, 540; *Mason* v. *Baker*, 1 A. K. Marsh. 208; 10 Am. Dec. 724; *Dale* v. *Harrison*, 4 Bibb, 65. It also obtains in Alabama: *Williams* v. *Higgins*, 69 Ala. 517, 523; *Dearman* v. *Radcliffe*, 5 Ala. 192, 193; it being declared in that state that where lands are conveyed in fraud of creditors, no matter what the agreement of the grantee to hold in trust or to reconvey may have been, the grantor is precluded from recovering back the title, not that the grantee, by such conveyance, is given an honest right to hold, but because, by reason of the vicious intent of the grantor he forfeits all right to recover: *Kelly* v. *Karsner*, 72 Ala. 106, 111; and this doctrine prevails in Maryland: *Lamborn* v. *Moore*, 6 Har. & J. 422, 426; *Freeman* v. *Sedwick*, 6 Gill, 28; 46 Am. Dec. 650; *Bayne* v. *Suit*, 1 Md. 80, 86; *Roman's Devisee* v. *Mali*, 43 Id. 513, 533; *Wilson* v. *Watts*, 9 Id. 356, 456; also in Ohio: *Roll* v. *Raguet*, 4 Ohio, 400, 419; 22 Am. Dec. 759; *White* v. *Brocaw*, 14 Ohio St. 339, 341; *Trimble* v. *Doty*, 16 Ohio St. 118, 129; *Emrie* v. *Gilbert*, Wright, 764; *Goudy* v. *Gebhart*, 1 Ohio St. 263, 268; *Barton* v. *Morris*, 15 Ohio, 408, 428; also in Nevada: *Peterson* v. *Brown*, 17 Nev. 172; 45 Am. Rep. 437; and in Virginia: *James* v. *Bird's Adm'r*, 8 Leigh, 510; 31 Am. Dec. 668, and note 670; *Owen* v. *Sharp*, 12 Leigh, 427, 429; *Thomas* v. *Soper*, 5 Munf. 28; also in Colorado: *Coon* v. *Rigden*, 4 Col. 275, 281; also in Connecticut: *Owen* v. *Dixon*, 17 Conn. 496. Though it is said in *Nichols* v. *McCarthy*, 53 Id. 299, 324, 55 Am. Rep. 105, that "it is a well settled rule than where a debtor understandingly and deliberately conveys away his property to defraud or hinder his creditors, a court of equity will not lend him its aid to recover the property back. . . . . It is not, perhaps, an established qualification of the rule mentioned that a person who, in retaining property conveyed to him, is himself guilty of a fraud, cannot avail himself of the prior fraud of the grantor for the purpose of keeping the property, but such a qualification of the rule is at least implied in *Railroad Company* v. *Durant*, 95 U. S. 579, and *Byington* v. *Moore*, 62 Iowa, 470. Such a qualification seems a reasonable one." See also, as sustaining the above principal rule, *Kinney* v. *Consolidated Mining Co.*, 4 Saw. 382; *Schenck* v. *Hart*, 32 N. J. Eq. 774, 782; note 34 Am. Dec. 765; *Pemberton* v. *Smith*, 3 Head, 18; *Fowler* v. *Stoneum*, 11 Tex. 478, 502; 62 Am. Dec. 490; *Dansey* v. *Smith*, 4 Tex. 411; *Epperson* v. *Young*, 8 Id. 135; *Portes* v. *Hill*, 14 Id. 69; *Hall* v. *Callahan*, 66 Mo. 316, 323; *Powell* v. *Inman*, 8 Jones, 436; 82 Am. Dec. 426; *Quirk* v. *Thomas*, 6 Mich. 98; *Hazard* v. *Hall*, 5 Mo. App. 584; *Frasner* v. *City Council*, 19 S. C. 384, 403; *Hollis* v. *Morris*, 2 Harr. (Del.) 128; *Newson* v. *Douglass*, 7 Har. & J. 317; 16 Am. Dec. 317; *Cushwa* v. *Cushwa's Lessee*, 5 Md. 44; *Jackson* v. *Dutton*, 3 Harr. (Del.) 98; in this last case the conveyance was fraudulently made to deprive the wife of alimony: *Terrel's Heirs* v. *Cropper*, 9 Mart. (La.) 350; 13 Am. Dec. 309; *Burns* v. *Baugert*, 92 Mo. 167; *Rust* v. *Shackelford*, 47 Ga. 534; *Steadman* v. *Hayes*, 80 Mo. 319; *Skinner* v. *Oakes*, 10 Mo. App. 45, 50; *Burke* v. *Adams*, 80 Mo. 505; 50 Am. Rep. 510; *Bush* v. *Rogan*, 65 Ga. 320; 38 Am. Rep. 785, where the decision seems limited to those cases where a consideration was paid; it was also said in this case that the grantor to such fraudulent deed will not be permitted in an action of ejectment to set up the fraud: *Anderson* v. *Brown*, 72 Ga. 713, 722; *Edward* v. *Kilpatrick*, 70 Id. 328; but see *Harrison* v. *Hatcher*, 44 Ga. 638, 642. Whether such fraudulent executory contracts are held to be valid or a nullity, the conclusion that they can be enforced is certainly not a logical one, or at least not one founded on legal or equitable principles, because, as in the particular instance of enforcing the collection of notes given in the payment of land or personal property so fraudulently transferred, the court

thereby simply enables the fraudulent grantor or vendor to reap the fruits of his covinous transaction by collecting the proceeds of such sale, grant, or transfer. The following cases, therefore, which hold that such executory contract cannot be enforced, seem more consistent with all law and equity: *Hamilton* v. *Scull's Adm'r*, 25 Mo. 165; 69 Am. Dec. 460; *Norris* v. *Norris's Adm'r*, 9 Dana, 318; 35 Am. Dec. 138; *Jones* v. *Read*, 3 Dana, 540; *Dearman* v. *Radcliffe*, 5 Ala. 192, 193; *Freeman* v. *Sedwick*, 6 Gill, 28; 46 Am. Dec. 650, and note 654; *Larrimore* v. *Tyler*, 88 Mo. 661, 668; *Trimble* v. *Doty*, 16 Ohio St. 118; *Fenton* v. *Ham*, 35 Mo. 409; *Goudy* v. *Gebhart*, 1 Ohio, 263; *Roll* v. *Raguet*, 4 Id. 400, 419; 22 Am. Dec. 759; *Anderson* v. *Dunn*, 19 Ark. 650, 659; *Vick* v. *Flowers*, 1 Murph. 321; *Jackson* v. *Marshall*, 1 Id. 323; 3 Am. Dec. 690; *Powell* v. *Inman*, 8 Jones, 436; 82 Am. Dec. 426, and note 428; *Boatner* v. *Yarborough*, 12 La. Ann. 249, 251; *Denton* v. *Wilcox*, 2 Id. 60; *Meyer* v. *Farmer*, 36 Id. 785, 789; *Succession of Pointer*, 24 Id. 275; *Heinsman* v. *Newman*, 55 Ga. 262; *Eyre* v. *Eyre*, 19 N. J. Eq. 42; *Schenck* v. *Hart*, 32 Id. 774, 781; although in *Owens* v. *Owens*, 23 Id. 60, 62, the application of the rule seems limited to executory contracts without consideration; and see *Mason* v. *Baker*, 1 A. K. Marsh. 208; 10 Am. Dec. 724; *Dale* v. *Harrison*, 4 Bibb, 65; but examine *Dansey* v. *Smith*, 4 Tex. 411, 415; *Holt* v. *Creamer*, 34 N. J. Eq. 181, 182; *Aubic* v. *Gil*, 2 La. Ann. 342; *Louis* v. *Richard*, 12 Id. 684; *Lessee of Barton* v. *Heirs of Morris*, 15 Ohio, 408, 428; *Hess* v. *Final*, 32 Mich. 516; *Ross* v. *Garlick*, 10 Rob. (La.) 365, 370; *Herz* v. *Wilder*, 10 La. Ann. 199, 201; 1 Pomeroy's Eq. Jur., sec. 401; 2 Id., secs. 916, 940; *McCausland* v. *Ralston*, 12 Nev. 195; 28 Am. Rep. 781, — where this question in regard to executed and executory contracts is considered, and the English and American authorities reviewed at length; see also Bigelow on Frauds, ed. 1888, 207.

RIGHT OF EXECUTOR OR ADMINISTRATOR TO IMPEACH OR DEFEND ON GROUND OF FRAUD. — In *Lockwood* v. *Krum*, 34 Ohio St. 1, 10, it was said that the point whether an executor or administrator could recover property so fraudulently conveyed had not then been authoritatively settled in that state; nor was it decided in that case; although such right was denied in *Benjamin* v. *Le Baron's Adm'r*, 15 Ohio, 517; and it was also decided in *Kilbourne* v. *Fay*, *Keller* v. *Shaeffer*, 29 Ohio St. 264, 284, 23 Am. Rep. 741, that where the mortgagor of chattels dies insolvent, and in possession of the estate, the property becomes assets in the hands of the executor or administrator, where such mortgage was based on fraud and was void as to creditors, and that it was the duty and right of such representative of the mortgagor to protect such property against the mortgagee; and that it made no difference that the mortgage was a valid lien against the mortgagor during his lifetime, and against the distributees of his estate after his death. In a majority of cases, however, it is decided that an administrator of a fraudulent grantor cannot maintain a suit to set aside such fraudulent conveyance: *McLaughlin* v. *McLaughlin's Adm'r*, 16 Mo. 242; *George* v. *Williamson*, 26 Id. 190; 72 Am. Dec. 203; *Kellinger* v. *Reidenhauer*, 6 Serg. & R. 531; *Pringle* v. *Pringle*, 59 Pa. St. 281, 286; *Henriques* v. *Hone*, 2 Edw. Ch. 119; *Snodgrass* v. *Andrews*, 30 Miss. 472, 488; 64 Am. Dec. 169, and note 175; *Armstrong* v. *Stovale*, 26 Miss. 275, 277; *Partee* v. *Matthews*, 53 Id. 140; *Van Wickle* v. *Calvin*, 23 La. Ann. 205; *Hall* v. *Callahan*, 66 Mo. 316, 323; *Kinneman* v. *Miller*, 2 Md. Ch. 407; *Holt* v. *Creamer*, 34 N. J. Eq. 181, 182; *Connell* v. *Chandler*, 13 Tex. 5; 62 Am. Dec. 545; *Davis* v. *Swanson*, 54 Ala. 277; 25 Am. Rep. 678; *Hunt* v. *Butterworth*, 21 Tex. 133; 73 Am. Dec. 223, and note 228; *Avery* v. *Avery*, 12 Tex. 54, 57; 62 Am. Dec. 513, and note 518;

Mulloy v. *Young*, 10 Humph. 297, 300; *Moody* v. *Fry*, 3 Id. 567; *Estes* v. *Howland*, 15 R. I. 127, citing Bump on Fraudulent Conveyances, 3d ed., 445, notes 1, 2; *Crawford's Adm'r* v. *Lehr*, 20 Kan. 509; *White* v. *Russell*, 79 Ill. 155; *Burton* v. *Farinholt*, 86 N. C. 260; *Merry* v. *Fremon*, 44 Mo. 518; *Zoll* v. *Soper*, 75 Id. 460; *Cobb* v. *Norwood*, 11 Tex. 556; *Boggs* v. *McCoy*, 15 W. Va. 344.

So trover will not lie by the administrator to recover goods of the intestate so fraudulently transferred, although it was not decided in this case whether any remedy would lie in chancery: *Benjamin* v. *Le Baron's Adm'r*, 15 Ohio, 517, 526. Nor can such fraud be set up by the administrator of a mortgagor in a suit upon the mortgage, since neither party to the fraud could profit by the fraud to defeat the claim of either party under it: *Williams's Adm'x* v. *Williams*, 34 Pa. St. 312; and where the administrator took possession of such goods so fraudulently conveyed away by his intestate, it was held, in an action of trespass brought by the fraudulent vendee from whom they had been taken, that the fraud of the intestate could not be set up by his administrator as a defense: *Osborne* v. *Moss*, 7 Johns. 161; 5 Am. Dec. 252, and note. The case relies upon *Hawes* v. *Leader*, Cro. Jac. 270; Yelv. 196. But see *Nellis* v. *Clark*, 20 Wend. 24; 4 Hill, 424; and see *Pillsbury* v. *Kinonon*, 33 N. J. Eq. 287; 36 Am. Rep. 556, 565, as to assignee; and examine note 62 Am. Dec. 546; *Tenney* v. *Poor*, 14 Gray, 500; 77 Am. Dec. 340, and note 342; *Brown's Adm'r* v. *Finley*, 18 Mo. 375; *Gibbons* v. *Peeler*, 8 Pick. 254; *Holland* v. *Kruft*, 20 Id. 32; *Babcock* v. *Booth*, 2 Hill, 85; 38 Am. Dec. 578; *Stewart* v. *Kearney*, 6 Watts, 453; 31 Am. Dec. 482; *Buehler* v. *Gloniger*, 2 Watts, 226; and the fact that the administrator or executor is a creditor himself does not enable him to impeach such deed or conveyance: *Moody's Adm'r* v. *Fry*, 3 Humph. 567; *Osborne* v. *Moss*, 7 Johns. 161; 5 Am. Dec. 252, and note.

But in New York executors and administrators are by statute enabled to impeach such fraudulent conveyances of the deceased: *Moseley* v. *Moseley*, 15 N. Y. 334; *Babcock* v. *Booth*, 2 Hill, 181; 38 Am. Dec. 598, and note. They not only may do this in that state, but it is their duty to pursue such property where there are not otherwise sufficient assets to pay the debts, and to recover the same for the benefit of creditors: *Lichtenberg* v. *Hertfelder*, 103 N. Y. 302, 306. So in Tennessee such fraudulent deed could not be impeached by the administrator for the fraud of the deceased, until the act of 1852, which was carried into the code at section 3241: *Battle* v. *Street*, 85 Tenn. 282, 293. And in New Jersey such action lies, under the assignment act, by the representatives of the deceased: *Pillsbury* v. *Kingdon*, 33 N. J. Eq. 287, and see cases in note thereto 288; 36 Am. Rep. 556, 565. So it was held in *Blake* v. *Jones*, 1 Bail. Eq. 141, 21 Am. Dec. 530, that the administrator may set up the fact that a gift of his intestate was fraudulent and void as to creditors, in an action to establish such gift; and the personal representative of a fraudulent vendor who remained in possession of the property until the time of his death can because of non-delivery set up the fraud for the benefit of creditors, and thus avoid the sale: *Hunt* v. *Butterworth*, 21 Tex. 133; 73 Am. Dec. 223.

So such administrator may have such recovery of the estate of the deceased, notwithstanding his fraud, where it appears that such estate is needed to pay the expenses of the administration: *Estes* v. *Howland*, 15 R. I. 127; or where it appears that a fraudulent assignment of the property of the intestate was procured by the covinous conduct of the assignee: *Prewett* v. *Coopwood*, 30 Miss. 289. So in Pennsylvania and North Carolina, where his

estate is otherwise insufficient to pay his debts: *Stewart* v. *Kearney*, 6 Watts, 453; 31 Am. Dec. 482; *Coltraine* v. *Causey*, 3 Ired. Eq. 246; 42 Am. Dec. 168.

RULE EXTENDED TO OTHER ILLEGAL AND IMMORAL CONTRACTS. — *White* v. *Hunter*, 23 N. H. 128, was a case which extended the doctrine beyond that of conveyances made in fraud of creditors to all contracts based upon an immoral or illegal consideration, the parties being *in pari delicto*, and declared that the whole current of authority holds that in such case the parties can have no relief, and that land so conveyed, or money so paid, cannot be recovered back. "The party thus guilty, thus *particeps criminis*, thus in *pari delicto*, will not be listened to, when he alleges and offers evidence of his own criminality, or immorality and turpitude, as a ground upon which to establish a claim of right against another in a court of justice."

The following cases are cited by the court and are in point: *Howson* v. *Hancock*, 8 Term Rep. 575; *Vandyck* v. *Hewett*, 1 East, 98; *Smith* v. *Bromley*, Doug. 696, note; *Lowry* v. *Bourdieu*, Doug. 467; 2 Comyns on Contracts, 109; *Browning* v. *Norris*, Cowp. 790; *Steers* v. *Lashley*, 6 Dowl. & L. 61; *Brown* v. *Turner*, 7 Id. 630; *Clark* v. *Shee*, Cowp. 197; *McCullum* v. *Gonslay*, 8 Johns. 113; *Inhabitants of Worcester* v. *Eaton*, 11 Mass. 368; *White* v. *Franklin Bank*, 22 Pick. 181; *Babcock* v. *Thompson*, 3 Id. 446; 15 Am. Dec. 235; *Burt* v. *Place*, 6 Cow. 431; *Denton* v. *English*, 2 Nott & McC. 581; 10 Am. Dec. 638; *Roby* v. *West*, 4 N. H. 285; 17 Am. Dec. 423. See also *Heineman* v. *Newman*, 55 Ga. 262; *Hinnen* v. *Newman*, 35 Kan. 709, where the rule is extended to immoral and all transactions which contravene public policy and are clearly illegal.

EXCEPTIONS. — The rule that the courts will refuse to aid either party to a fraudulent transaction entered into to defraud others is subject to very few exceptions: *Watt* v. *Conger*, 13 Smedes & M. 412, 421. But "where public interest requires its [the court's] intervention, relief will be granted, though the result may be that the property will be restored to, or a benefit derived by, a plaintiff who is in equal guilt with the defendant. In such cases the guilt of the respective parties is not considered by the court, which looks only to the higher right of the public, the guilty party to whom relief is granted being only the instrument by which the public is served": *O'Conner* v. *Ward*, 60 Miss. 1025, 1037, citing *St. John* v. *St. John*, 11 Ves. 535; *Hatch* v. *Hatch*, 9 Ves. 292; *Morris* v. *MacCulloch*, 2 Eden, 190; *Roberts* v. *Roberts*, 3 P. Wms. 65; *Smith* v. *Bromley*, Doug. 695; *Browning* v. *Morris*, Cowp. 790; *Osborne* v. *Williams*, 18 Ves. 379; *W.*—— v. *B.*——, 32 Beav. 574; *Ford* v. *Harrington*, 16 N. Y. 285. And it is further said in this connection that "courts are and should be cautious in affording relief to a fraudulent debtor or other violator of the law under this exception, and should act only where it is evident that some greater public good can be subserved by action than by inaction; some security afforded to a class of persons entitled to peculiar protection, or some safeguard thrown around a relationship which is an object of the law's jealous consideration. But it may be safely asserted that it will be of far greater protection to the public, that one occupying the relation of guardian, trustee, executor, or administrator shall in all cases be compelled to return any property or profit secured by his frauds from those whose interests he is bound to protect, than to permit him under any circumstances to shelter himself behind the plea that those defrauded by him were themselves guilty of an equal wrong": *O'Conner* v. *Ward*, *supra*. *Starke's Ex'r* v. *Littlepage*, 4 Rand. 368, is declared in *Horn* v. *Star Foundry Co.*, 23 W. Va. 522, 537, to be an exception, and one in which "it is obvious that to refuse to enforce this

fraudulent contract would be to encourage such fraudulent arrangements, as such refusal would have made the fraudulent scheme of the debtor a perfect success. . . . . In such cases it is only the public interest which the courts regard, and they care nothing for the interest of the parties to such fraudulent arrangements." See also *Cushwa* v. *Cushwa's Lessee*, 5 Md. 44, 52. So where a creditor has availed himself of his power over the debtor, and by misrepresentation induced him to unite in a fraudulent conveyance to him of certain property, it was held that a court of equity ought to take cognizance of the situation of the debtor as not being so culpable as the creditor, and apportion the relief granted to the degree of criminality in both parties: *Austin* v. *Winston*, 1 Hen. & M. 33; 3 Am. Dec. 583, and note 601. And the court, in *Gay* v. *Wendem*, 2 Freem. 101, refused to enforce a bond privately given by a sister to her brother to return certain money which he had given her to enable her to more favorably form a marriage, this being an exception where the court refused relief because if such bond could be recovered such frauds against public policy could be practiced with impunity.

So it is said in 2 Pomeroy's Eq. Jur., sec. 941, that to the general rule "there is an important exception even where the parties are *in pari delicto*, the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him. In pursuance of this principle, and in compliance with the demands of a high public policy, equity may aid a party equally guilty with his opponent, not only by canceling and ordering the surrender of an executory agreement, but even by setting aside an executory contract, conveyance, or transfer, and decreeing the recovery back of money paid or property delivered in performance of the agreement. The cases in which this limitation may apply, and the affirmative relief may thus be granted, include the class of contracts which are intrinsically contrary to the public policy, — contracts in which the illegality itself consists in their opposition to public policy, and any other species of illegal contracts, in which, from their particular circumstances, incidental and collateral, motives of public policy require relief." And in a recent case in Virginia, the court holds that "if, in a particular case, it can be clearly shown that the observance of the rule that the plaintiff will be furnished no relief in such a case, would tend to encourage such fraudulent and vicious practices by really giving effect to the objects which the parties had in contemplation when such fraudulent and vicious schemes were devised, then the courts will not apply the rule, but will permit such fraudulent plaintiff to recover, not because of any favor that the court is disposed to show him, but simply because, in such a peculiar case, the public policy requires that such recovery or relief should be had against the fraudulent defendant. It rarely happens, however, that public policy requires the courts to render relief to the plaintiff on such fraudulent or vicious contract": *Horn* v. *Star Foundry Co.*, 23 W. Va. 522, 533. So it is held in Florida, in *Bellamy* v. *Bellamy's Adm'r*, 6 Fla. 62, 103, that "in equity, the general maxim of *pari delicto* does not always prevail. Circumstances of the particular case often form exceptions, and where it is necessary, relief will be granted"; and cites 1 Story's Eq. Jur., sec. 380; *Eastbrook* v. *Scott*, 3 Ves. Jr. 456; *Austin's Adm'x* v. *Winston's Ex'r*, 1 Hen. & M. 33; 3 Am. Dec. 583; Hill on Trustees, sec. 164; *Williams* v. *Avant*, 5 Ired. 50; *Starke's Ex'r* v. *Littlepage*, 4 Rand. 372; *James* v. *Bird's Adm'r*, 8 Leigh, 512; 31 Am. Dec. 668; and where a note was given by A to his brother to enable him to make a wealthy marriage, it was enforced because for the public good, and also upon the ground that such contracts would best be

discouraged by enforcing them: *Montefiori* v. *Montefiori*, 1 W. Black. 363. In Hill on Trustees, sec. 164, it is said that "where the transaction is against public policy, this equity may be enforced by the party himself who has created the interest, although he be *in pari delicto* with the defendant, but relief will only be given in these cases [viz., exceptions to the rule] upon the terms of returning any consideration that may have been received." In *James* v. *Bird's Adm'r*, 8 Leigh, 512, 31 Am. Dec. 668, doubt is expressed as to whether *Austin's Adm'x* v. *Winston's Ex'r*, *supra*, was properly decided; the court saying that it was the only case in equity where relief had been given to a grantor of property who had fraudulently conveyed it to another to defeat creditors; and in *Starke's Ex'rs* v. *Littlepage*, 4 Rand. 372, the exception to the rule *in pari delicto* is thus stated: "But this rule operates only in cases where the refusal of the courts to aid either party frustrates the object of the transaction, and takes away the temptation to engage in contracts *contra bonos mores*, or violating the policy of the laws. If it be necessary, in order to discountenance such transactions, to enforce such a contract at law, or to relieve against it in equity, it will be done, though both parties are *in pari delicto*. The party is not allowed to allege his own turpitude in such cases when defendant at law, or prevented from alleging it when plaintiff in equity, whenever the refusal to execute the contract at law, or the refusal to relieve against it in equity, would give effect to the original purpose, and encourage the parties engaging in such transactions." Several instances are considered, and the court adds: "In these and many other cases, ... the contract is enforced or avoided, both at law and in equity, as may best answer the purpose of discouraging the fraud or contract against the policy of the law; and it is for this purpose, and not because the defendant is, in such cases, strictly entitled, on his own account, to be discharged from the contract, that the rule is established that *in pari delicto* . . . . *defendentis;* a rule which, in general, discourages vicious contracts, but which is not enforced when it would counteract this policy of the law."

Another exception is made in *Fagg* v. *Tennessee Nat. Bank*, 9 Heisk, 479, 487, between cases where the parties are *in delicto*, and not *in pari delicto*, the rule not being applied in the former case. Upon this point, the rule stated in Bump on Fraudulent Conveyances — that where such conveyances are made, the court will not inquire into the degrees of guilt between the grantor and grantee — is disputed in *O'Connor* v. *Ward*, 60 Miss. 1025, 1035; and it is there declared not to be a universal rule, and not supported by the authorities, the exception being there made that although the parties are *in delicto*, yet not *in pari delicto*, the court will, in certain cases, grant relief to the least guilty, if the "circumstances are such as to justify the court in proceeding, notwithstanding the fraudulent character of the conveyances"; citing *Ybarra* v. *Lorenzana*, 53 Cal. 197. And it is said by the court in *Roman* v. *Mali*, 42 Md. 513, 532, that "there are exceptions to the general rule that courts of justice will not actually interpose for the relief of a party who has been *particeps criminis* in an illegal or fraudulent transaction; and that one of the exceptions is, where the party suing, although *particeps criminis*, is not *in pari delicto* with the adverse party. There may be different degrees of guilt as between the parties to the fraudulent or illegal transaction; and if one party act under circumstances of oppression, imposition, undue influence, or at great disadvantage with the other party concerned, so that it appears that his guilt is subordinate to that of the defendant, the court, in such case, will relieve." But see opinion of Stewart, J., Id. 534.

MISCELLANEOUS. — It is said in *Wheeler* v. *Sage*, 1 Wall. 518, 529, to be a fundamental principle that a party who seeks relief in equity must be able to show that there has been honesty and fair dealing, since the maxim *in pari delicto* otherwise applies. Therefore, where one becomes voluntarily a party to an obligation intentionally made in fraud of the law, and then asks in a court of equity to be relieved from its fulfillment, "the condign and appropriate answer to such a prayer from such a tribunal is this: that, however unworthy may have been the conduct of your opponent, you are confessedly *in pari delicto;* you cannot be admitted here to plead your own demerits; precisely, therefore, in the position in which you have placed yourself, in that position we must leave you": *Creath's Adm'r* v. *Sims*, 5 How. 192, 204. It is determined in Illinois that although the original conveyance is fraudulent, yet a reconveyance made by the fraudulent grantee to his grantor, in pursuance of the original agreement, is not tainted with fraud, but is valid, and that notes executed at the time of such reconveyance, pursuant to a verbal agreement made during the original fraudulent transaction, may be enforced: *Second National Bank* v. *Brady*, 96 Ill. 498. And if personal property be transferred by way of pledge or security, the party so transferring, or those claiming under him, may redeem the same notwithstanding the transfer is fraudulent as to creditors: *Jones* v. *Rahilly*, 16 Minn. 320. Or where the grantor subsequently pays his debts, and is relieved therefrom by a discharge in bankruptcy, and a subsequent agreement is entered into by which the grantor surrenders to the grantee the notes given for the property, and in consideration thereof the latter surrenders all his right, title, and interest in the property, and the deed is to be canceled by agreement; here such original transfer is purged of the fraud, and the subsequent agrement will be enforced: *Songer* v. *Partridge*, 107 Ill. 529, 534; and if the deed is not in fact executed, no property is conveyed, and the title remains in the grantor: *Parkhurst* v. *McGraw*, 24 Miss. 134, 139.

So where the fraudulent grantee of land takes any steps or does any act subsequent to the conveyance in the performance of his moral duty to restore the property, such acts will be favorably considered by a court of equity: *White* v. *Brocaw*, 14 Ohio St. 339, 341. As bearing directly upon the question of recriminatory fraud, it was said in *Lord* v. *Doyle*, 1 Cliff. 453, 458, that "it would be an encouragement to fraud to hold that the wrongful act of one party to a suit is a justification to another wrongful act on the part of the other party of equal magnitude and immorality. Frauds are forbidden in equity, and when committed, they cannot be set off one against another, but each separate transaction must stand or fall by itself." In applying the rule governing in this class of cases, it is held that a bad motive is not alone sufficient; there must be an illegal act, since if such conveyance is made to avoid a debt where none exists, or the property conveyed is of a character which could not be subjected by the creditor, and a contract otherwise valid is entered into to treat the conveyance as a mortgage, or providing for a reconveyance by the grantee, the latter will not be permitted, in an action brought to enforce such agreement, to set up the defense alone that the grantor intended to defraud his creditors by such conveyance: *O'Conner* v. *Ward*, 60 Miss. 1025, 1037, citing *Denman* v. *Denman*, 4 Ala. 521; *Brady* v. *Ellison*, 2 Hayw. 348; *Smith* v. *Bruser*, 2 Id. 296; *Boyd* v. *De la Montaigne*, 73 N. Y. 498; 29 Am. Rep. 197.

COLEMAN v. PIKE COUNTY.

[83 ALABAMA, 526.]

DEMURRER TO ENTIRE COMPLAINT IN ACTION ON OFFICIAL BOND IS PROPERLY OVERRULED, where, several breaches of the bond being assigned, some of them are sufficiently certain and definite.

PROOF OF EXECUTION OF BOND WHICH IS FOUNDATION OF SUIT is not required under provision of the Alabama Code, section 3036, unless the execution is denied by a verified plea.

RECEIPT IN FORM OF I O U, GIVEN BY COUNTY TREASURER TO TAX COLLECTOR, IS ADMISSIBLE as evidence against the sureties of the treasurer, since deceased, and it is competent to show, by parol evidence, that the instrument was intended as a receipt for so much of the county tax, to be accounted for in a settlement with the collector at the end of the month.

RULE THAT PAROL EVIDENCE CANNOT BE ADMITTED TO VARY, EXPLAIN, OR CONTRADICT WRITING is confined to the parties to the writing; and when it comes in question collaterally between one of the parties and others, neither party is estopped to contradict or explain it.

WHEN COUNTY TREASURER RECEIVES MONEYS IN HIS OFFICIAL CAPACITY, AS COUNTY TAXES, HE AND HIS SURETIES ARE ESTOPPED TO DENY that they are the moneys of the county, for the lawful disbursement of which he is responsible on his official bond, whatever the character of the papers given by him to the collector as representing the amounts so received.

BILE BOOKS AND ENTRIES MADE BY COUNTY TREASURER, OR HIS AGENT, ARE PRIMA FACIE evidence against him and his sureties, yet entries made by the agent after the termination of his agency by the death of the treasurer are not binding on him or his sureties, and are not admissible in evidence against them.

IN ACTION AGAINST SURETIES ON OFFICIAL BOND OF DECEASED COUNTY TREASURER, seeking to charge them with a default of their principal, the tax collector, and the probate judge who acted as the agent of the treasurer in attending to his official duties, may each testify to their transactions with him.

ACTION brought in the name of Pike County against the defendants, as sureties on the official bond of one Tyler, deceased, as treasurer of said county. The defendants demurred to the complaint, and the demurrer was overruled. The rulings of the court on the evidence, etc., assigned as error by the defendants, sufficiently appear in the opinion.

Gardner and Wiley, and M. N. Carlisle, for the appellants.

Parks and Son, contra.

By Court, CLOPTON, J. 1. There are several breaches of the bond sued on assigned in the complaint, some of which are too general, while others, relating to the illegal use or expenditure of the money of the county, and the failure to keep and disburse it according to law, are sufficiently certain

and definite. The demurrer goes to the entire complaint, each assignment of a breach being specified as cause of demurrer. Some of the assignments being sufficient, the demurrer was properly overruled: *Williamson* v. *Wolf*, 37 Ala. 298.

2. The complaint alleges that the bond, which is set forth therein, and is the foundation of the suit, was executed by the defendants. Under the statute, the bond must be received as evidence without proof of execution, unless the execution is denied by a verified plea: Code, sec. 3036; *Johnson* v. *Caffey*, 59 Ala. 331.

3. The material question arises on the admission in evidence of two papers given by the county treasurer to the tax collector, and on the ruling of the court in reference to the liability of the sureties on his official bond for the amounts of the same. One of these papers is in the following form: "I O U four hundred and nineteen dollars, November 28, 1885. J. F. Tyler, C. T." The other is for sixteen hundred dollars, similar in form, except as to date and amount. It appears from the evidence of the collector that the treasurer collected some taxes as his agent, which he stated he had used in paying court expenses. The first paper was given for the amount of taxes so collected. The second was given for taxes collected by the collector, which he let the treasurer have to pay some claims against the county. The treasurer received these sums as so much of the county tax, to be accounted for in a settlement with the collector at the end of the month, and the papers were intended as receipts. It is first objected that the papers are the individual obligations of the treasurer, and that parol evidence is inadmissible to show that they were to have a different legal effect. The rule that parol evidence cannot be admitted to vary, explain, or contradict a writing, is confined to the parties to the writing, and when it comes in question collaterally between one of the parties and others, neither party is estopped to contradict or explain it; and as between the parties it is admissible to show that a particular mode of payment was agreed on: *Venable* v. *Thompson*, 11 Ala. 147; *Murchie* v. *Cook*, 1 Id. 41.

4. It further appears that Hilliard, the judge of probate, who was requested by the treasurer to attend to his official duties for him, made two settlements with the collector, — one before and one after the death of the treasurer, — and in

one or the other of these settlements he received these two papers from the collector, as evidencing the payments of so much of the county taxes to the treasurer. The evidence leaves in doubt in which settlement he took the papers. This was an inference to be drawn by the jury. If they were accepted in the settlement before the death of the treasurer, the transaction was within the scope of Hilliard's authority as agent, and was binding on the treasurer. The instructions relating to this matter, requested by the defendant, were to the effect that the sureties were not liable for the amounts represented by the papers under any circumstances; and, in the light of the evidence, were properly refused. Furthermore, if the treasurer received the moneys in his official capacity, as county taxes, he and his sureties are estopped to deny that they are the moneys of the county, for the lawful disbursement of which he is responsible on his official bond, whatever may be the character of the papers given by him to the collector as representing the amounts so received: *Perryman* v. *Greenville*, 51 Ala. 507.

5. While the books and entries made by the treasurer or his agent are *prima facie* evidence against him, entries made by the agent after the termination of his agency by the death of the treasurer are not binding on him or his sureties, and not admissible in evidence against them. The court erred in admitting in evidence, against the objections of the defendants, the entry shown to have been made by Hilliard after the death of the treasurer. The error was not cured by the instruction that the defendants could relieve themselves from liability by explaining the entry. The effect was, to make such entry *prima facie* evidence against them, and fix on them the burden of explanation. If the accounts of the treasurer were so mingled in the different entries as to require separation, the entry after the death of the treasurer might have been used for this purpose; but the jury should have been instructed that they could use it for this purpose alone, and not to regard it as evidence.

6. The tax collector and Hilliard were competent witnesses to testify to transactions with the deceased treasurer: *Garret* v. *Trabue, Davis, & Co.*, 82 Ala. 227.

Reversed and remanded.

RULE FORBIDDING USE OF PAROL EVIDENCE TO CONTRADICT a writing does not apply to a third person whose rights are paramount to such writing: *Tyson* v. *Post*, 2 Am. St. Rep. 410; and see *McMaster* v. *Ins. Co.*, 14 Am. Rep. 239.

ADMISSIBILITY OF PAROL EVIDENCE TO EXPLAIN or contradict receipt: *Pribble* v. *Kent*, 71 Am. Dec. 327; *Henry* v. *Henry*, 71 Id. 354, and note 355; *Ashley* v. *Vischer*, 85 Id. 65, and note 69; *Stapleton* v. *King*, 11 Am. Rep. 109; *De Lavalette* v. *Wendt*, 31 Id. 494.

EFFECT OF RECEIPTS OF OFFICERS AS EVIDENCE AGAINST THEIR SURETIES. — The effect to be given to receipts, official reports, entries, or returns made by public officers as evidence against their sureties of the facts thus stated, is a question upon which the adjudications are conflicting. It was held in an early leading case in this country, in a proceeding against a defaulting treasurer and his sureties, that the entries in the books kept by the treasurer were conclusive upon him and his sureties, to the extent that they would not be allowed to show that any sum, which was shown by the entries ought to be in the treasury at any given time, was not there: *Baker* v. *Preston*, 1 Gilm. 235, White, J., dissenting. The doctrine of this case was sustained in Indiana, the court holding that the statement of a township trustee, in his annual report to the county board of the amount of money in his hands, was conclusive against the trustee and his sureties in a suit on his official bond: *State* v. *Grammer*, 29 Ind. 530; followed in *State* v. *Prather*, 44 Id. 287. So in Iowa, in an action on a county treasurer's bond, it was held that the principal's accountings and settlements, made in pursuance of law, are to be deemed conclusive against him and his sureties, in the absence of mistake: *Boone County* v. *Jones*, 54 Iowa, 699; 37 Am. Rep. 229; and the doctrine of this case is approved, but the cases distinguished, in *State* v. *Hutchinson*, 60 Iowa, 478; *Webster County* v. *Hutchinson*, 60 Id. 721. In accord with this doctrine are also the Illinois decisions, holding that where a financial officer is his own successor, his entries of balances in his hands at the expiration of his first term, made in pursuance of legal requirement, are conclusive on himself and his sureties on his bond for the new term: *City of Chicago* v. *Gage*, 95 Ill. 593; 35 Am. Rep. 182; *Cawley* v. *People*, 95 Ill. 249, 261; *Morley* v. *Town of Metamora*, 78 Id. 394; 20 Am. Rep. 266. In a recent case in California, the action was against one Morgan, county treasurer, and the sureties on his official bond. Morgan was both treasurer and tax collector, and there was no doubt that he had misappropriated the county funds. But the point was made on behalf of the sureties that there was no evidence to show that the misappropriation occurred while Morgan was acting as treasurer, and that suit should have been brought against the sureties upon the bond as tax collector. The evidence was, that the auditor had settled with Morgan as tax collector, and gave him a certificate of the amount found due to the county; and the auditor thereupon credited Morgan as tax collector with the amount as paid, and charged him as treasurer with the same amount. The certificate given to Morgan by the auditor was afterwards found in the treasury. This was held to be sufficient, under the statutory provisions relating to the duties of treasurer, auditor, and tax collector, to charge Morgan and his sureties as treasurer. The court said that "in view of the fact that the statute requires the auditor's certificate to accompany the payment into the treasury, the fact that the certificate was found in the treasury gives rise to an inference that the payment accompanied the certificate": *Butte County* v. *Morgan*, Sup. Ct. Cal., April, 1888. A sheriff's return to an execution, showing the collection of the money thereon, was held to be conclusive upon the sureties on his official bond in a suit upon such bond, in *Bagot* v. *State*, 33 Ind. 262; overruled, however, on this point in *Lowry* v. *State*, 64 Id. 421, 427; compare *State* v. *McGee*, 7 Ired. 377.

A doctrine contrary to that above set forth, and one which is well sus-

tained by the authorities, is, that in a suit against the sureties of a defaulting public officer, the reports of the officer and entries made by him in his books are *prima facie* but not conclusive evidence against his sureties, and are open to explanation and contradiction by the sureties: *Broad* v. *City of Paris*, 66 Tex. 119; *Mann* v. *Yazoo City*, 31 Miss. 574; *Birsell* v. *Saxton*, 66 N. Y. 55; *Board of Supervisors* v. *Bristol*, 99 Id. 316. A leading case in support of this view is *United States* v. *Boyd*, 5 How. 29, holding that the returns of a receiver of public moneys of the United States to the treasury department are not conclusive evidence in an action by the government against the sureties upon the receiver's bond. The accounts rendered to the department of money received, properly authenticated, are evidence, in the first instance, of the indebtedness of the officer against the sureties, but subject to explanation and contradiction: *United States* v. *Boyd*, 5 How. 29, 54; and see *Williams* v. *United States*, 1 Id. 290; *Watkins* v. *United States*, 9 Wall. 759; compare *United States* v. *Girault*, 11 How. 22. The doctrine that settlements made by a public officer are only *prima facie* evidence against his sureties is also maintained, in *Nolly* v. *Callaway County*, 11 Mo. 447; followed in *State* v. *Smith*, 26 Id. 226; 72 Am. Dec. 204; and in a line with these decisions are *State* v. *Newton*, 33 Ark. 276; *State* v. *Rhoades*, 6 Nev. 352. In the latter case, *Baker* v. *Preston*, 1 Gilm. 235, holding the opposite doctrine, is severely criticised, and denied to be law. The same case has also been criticised and its soundness as authority questioned in later Virginia decisions: See *Munford* v. *Overseers etc.*, 2 Rand. 313; *Jacobs* v. *Hill*, 2 Leigh, 393; *Craddock* v. *Turner*, 6 Id. 116; *Crawford* v. *Turk*, 24 Gratt. 176. So the earlier Indiana decisions, *State* v. *Grammer*, 29 Ind. 530, and *State* v. *Prather*, 44 Id. 287, following *Baker* v. *Preston*, *supra*, have been expressly overruled, so far as sureties on bonds of public officers are concerned, by the later cases of *Lowry* v. *State*, 64 Id. 421, *Ohning* v. *Evansville*, 66 Id. 59, the latter holding that entries made by a city treasurer in the books kept for that purpose, purporting to be a statement of the funds of the city on hand at the close of a preceding and the beginning of a new term, are not conclusive upon, but may be contradicted by, his sureties, in an action against the treasurer and his sureties on his official bond, executed by them at the commencement of the new term; and see *State* v. *Haynes*, 79 Ind. 294. An act of the Indiana legislature passed March 31, 1879, declared that settlements made by public officers should not be conclusive evidence against their sureties. And it is said to be "evident that the legislature meant to do what the court has done, — overturn the doctrine of estoppel as declared in the case of *State* v. *Grammer*, 29 Id. 530, and leave the officers' account open for investigation in cases of fraud or mistake": *Heagy* v. *State*, 85 Id. 260, 262; see also 2 Ind. R. S., sec. 6507 (1888); *Hunt* v. *State*, 93 Ind. 321; *Rogers* v. *State*, 99 Id. 222. The rule as thus settled in Indiana is believed to be favored by the weight of authority independently of any legislation bearing upon the subject. In addition to the cases already cited as sustaining this view, see also *Lipscomb* v. *Postell*, 38 Miss. 477; 77 Am. Dec. 651; *Governor* v. *Suton*, 4 Dev. & B. 484; *State* v. *Fullenwider*, 4 Ired. 364; *Hatch* v. *Inhabitants etc.*, 97 Mass. 533; *Treasurers* v. *Bates*, 2 Bail. 362; *Townsend* v. *Everett*, 4 Ala. 607, to which may be added the principal case.

As to the effect of judgments against principals as evidence against their sureties, see *Charles* v. *Hoskins*, 14 Iowa, 471; 83 Am. Dec. 378, and extended note on the subject 380; *Stephens* v. *Shafer*, 48 Wis. 54; 33 Am. Rep. 793, and note 802; *Graves* v. *Bulkley*, 25 Kan. 249; 37 Am. Rep. 249, and note 252.

PRATT COAL AND IRON COMPANY *v.* BRAWLEY.

[83 ALABAMA, 371.]

FOR NEGLIGENCE CAUSING PERSONAL INJURIES TO MINOR CHILD, separate and concurrent actions may, in the absence of statute, be maintained by the child and its father.

IN ACTION BY CHILD FOR INJURIES CAUSED BY NEGLIGENCE of a third person, the contributory negligence of the child's father is no defense, and cannot be imputed to the child when it is of such tender years as to be legally presumed as incapable of judgment and discretion; but when the child is between the ages of seven and fourteen years, though *prima facie* incapable of judgment and discretion, evidence of capacity may be received, and contributory negligence imputed and shown in defense of the action.

IN ACTION BY FATHER FOR PERSONAL INJURIES TO CHILD CAUSED BY NEGLIGENCE, the contributory negligence of the child is a good defense, unless the child be within the age which raises the legal presumption of incapacity.

IN ACTION BY FATHER FOR PERSONAL INJURIES TO CHILD caused by negligence, the contributory negligence of the father is a complete defense, without regard to the age or capacity of the child.

IN ACTION FOR PERSONAL INJURIES TO CHILD CAUSED by the wanton, reckless, or intentional negligence of defendant, the contributory negligence of neither father nor child is available as a defense.

FATHER WHO KNOWINGLY PERMITS CHILD ABOUT SEVEN YEARS OF AGE to go unprotected upon the track of a railroad for the purpose of picking up coal at a place where trains are constantly passing is guilty of culpable negligence.

IF FATHER PERMITS GRANDMOTHER TO HAVE CARE AND CUSTODY OF CHILD, her negligence, whereby the child is injured, is to be imputed to the father.

ACTION by father for damages for personal injuries to his minor child. The opinion states the facts.

Hewitt, Walker, and Porter, and R. H. Pearson, for the appellant.

Smith and Lowe, for the respondent.

By Court, CLOPTON, J. Both the infant and the father may, in the absence of a statute, maintain separate and concurrent actions for personal injuries wrongfully done to his minor child. The principle on which the right to recover depends, and the elements of recoverable damages, are materially different in the two cases. When the infant sues for his own benefit, the application of the doctrine of contributory negligence depends on the capability of the plaintiff to exercise judgment and discretion. If the plaintiff is of such tender years that he is conclusively presumed incapable of judgment and discretion, and of owing a duty to another, neither con-

tributory negligence on his part nor that of his parent can be set up to defeat a recovery: *Gov. Street R. R.* v. *Hanlon*, 53 Ala. 70. A child between seven and fourteen years of age is *prima facie* incapable of exercising judgment and discretion, but evidence may be received to show capacity. If capacity be shown, the general rule of contributory negligence is applicable, whether the action is prosecuted on behalf and for the benefit of the child, or by the father for his own benefit. Whenever the plaintiff derives his cause of action from an injury to a third person, the contributory negligence of such third person is imputable to him, so as to charge him with the consequences. The proof shows that the child was a few months over seven years of age, but there was no evidence tending to show the requisite capacity. In such case, the presumption of incapacity prevails. The special pleas which set up as a defense the contributory negligence of the child, disconnected from and unaccompanied by the negligence of the father contributing, are insufficient. The defect consists in the want of an averment of capacity, the complaint alleging that the child was of an age when *prima facie* incapable.

The present action is brought by the father for his own benefit. The defendant filed other pleas, specially setting up the contributory negligence of the father, to which the court sustained a demurrer. When the father sues for an injury to his minor child, his neglectful conduct, proximately contributing to the injury, is a bar to the action, unless the injury was caused by the wanton, reckless, or intentional negligence of the defendant's employees, after having discovered the peril of the child, or when they ought to have discovered the peril: Beach on Contributory Negligence, 137; *Frazer* v. *Louisville and Nashville R. R. Co.*, 81 Ala. 185; 60 Am. Rep. 145. This is only the application in such case of the general rule, that the plaintiff's contributory negligence is a full defense which does not depend in any wise upon the capacity or incapacity of the child. Two actions were brought for personal injuries to a minor child, one by the infant, and the other by the father. The contributory negligence of the parent was set up as a defense in both actions. It was held, in the first case, that the negligence of the parent was not imputable to the child, and did not defeat a recovery; and in the latter case, that it was a bar to the action: *Bellefontaine and Indiana R. R. Co.* v. *Snyder*, 18 Ohio St. 399; 98 Am. Dec. 175; 24 Ohio St. 670; *Glasse* v. *Hestonville R'y Co.*, 57 Pa. St. 172.

The father owes to his minor child the duty of due and proper protection against danger, as may be required by the circumstances and occasion; and the duty is the more imperative, in proportion to the indiscretion and helplessness of the child. Failure to extend such protection is negligence. If, by neglect of duty in this respect, he proximately contributes to the injury of his child, he will be regarded as a concurrent wrong-doer with the party doing the injury. Argument is unnecessary to show that a father is guilty of negligence, who knowingly permits a child of about seven years of age to go unprotected on the track of a railroad, to get coal at a place where trains are constantly passing. It may be said that the plea avers this was by the permission of her grandmother; but it also alleges that she was under the care of her grandmother, by permission of the plaintiff. A parent is responsible for the negligent and wrongful acts of the person to whom he intrusts the custody and care of his minor child. If the grandmother, thus having the care of the child, permitted her to trespass on the track for the purpose of getting coal belonging to the defendant, lying on or in dangerous proximity to the track, where trains were constantly passing, and such trespass contributed to her injury, the plaintiff is chargeable with the consequences: *Bellefontaine R'y Co.* v. *Snyder*, 24 Ohio St. 670; *Moore* v. *Pennsylvania R. R. Co.*, 4 Am. & Eng. R. R. Cas. 569; 44 Am. Rep. 106. The demurrer to the plea was wrongfully sustained.

By the act of January 23, 1885, when any personal injury to any minor child is caused by the wrongful act or omission of any person, or any officer or agent of an incorporated company, or association of persons, the father, if living, may maintain an action for such wrongful act or omission, and recover such damages as the jury may assess; provided, that but one suit shall be maintained for such injury: Acts 1884–85, p. 99. The statute does not abrogate the rule that either may maintain an action, but prohibits concurrent or successive suits for one and the same injury by both father and child; and giving it a liberal construction, its operation is to authorize, in a suit brought by the father, the recovery of the damages which, independent of statute, would be recoverable only in a suit by the child,—so that the pendency of one suit, or judgment therein, would be sufficient in abatement, or bar, of the other. An election as to the party who shall sue is given; but if the father sues, he is not exempted from the consequences of his

own contributory negligence, or that of his child, if of suitable age or capacity. Whoever sues must take the burdens of an action brought by such party; and if the father be the plaintiff, the right to recover will depend on the principles we have declared. It may be well to remark that section 2588 of the code of 1886 materially modifies the act; but the modification does not affect this case.

As the defendant did not have the benefit of the defense of contributory negligence on the trial, and as the liability of the defendant will be governed by other considerations, if the truth of the plea be established, and the effect of the evidence may be thereby materially varied, it is unnecessary to review the conclusion and judgment of the city court on the evidence.

Reversed and remanded.

WHO MAY SUE FOR INJURY TO CHILD: See *Pittsburgh R. R. Co.* v. *Vining*, 92 Am. Dec. 269; *Fairmount R'y Co.* v. *Statler*, 93 Id. 714, and notes.

NEGLIGENCE OF PARENT, WHETHER IMPUTED TO CHILD: See *Erie C. P. R. R.* v. *Schuster*, 57 Am. Rep. 474–479; *Frazer* v. *Louisville & N. R. R. Co.*, 60 Id. 145; *Mangam* v. *Brooklyn*, 98 Am. Dec. 66, and cases cited in note.

WOOD *v.* WINSHIP MACHINE CO.

[83 ALABAMA, 424.]

JUDGMENT BY DEFAULT — WRITTEN INSTRUMENT SUFFICIENT TO SUPPORT. — A promissory note which obligates the maker to pay a specified sum as principal, with interest, "and ten per cent attorneys' fees," is construed to mean ten per cent on the amount of the note as attorneys' fees in any suit brought to enforce its collection, and such a demand will support a judgment by default for the entire amount due, including the attorneys' fees: Ala. Code 1886, sec. 2740.

ACTION by the Winship Machine Company against Wood and Brothers, on a contract of guaranty indorsed on a promissory note. The note contained a clause in which the makers and indorsers waived their right of exemption, and the guaranty executed by the defendants was in the following words: "For value received, we guarantee the payment of this note, and waive protest and notice." Other facts appear in the opinion. A judgment by default against the defendants was assigned by them as error.

Gardner and Wiley, for the appellants.

By Court, SOMERVILLE, J. The action is founded on a written instrument, ascertaining the plaintiff's demand, and the

judgment is one by default. The note obligates the maker to pay principal, interest, and ten per cent attorneys' fees. This we construe to mean ten per cent on the amount of the note as attorneys' fees in any suit brought to enforce its collection. Such a demand will support a judgment by default for the entire amount due, including the attorneys' fees, without the intervention of a jury: Code 1886, sec. 2740; *McKenzie* v. *Clanton*, 33 Ala. 528; *Burns* v. *Howard*, 68 Id. 352. It is not a case of recovery for a mere penalty stipulated to be paid by written promise, as in *McPherson* v. *Robertson*, 82 Id. 459, where it was held error to render judgment by default without writ of inquiry by a jury to determine the amount of damages.

Affirmed.

JUDGMENT BY DEFAULT, WHAT JUDGMENT ROLL CONSISTS OF: *Hahn* v. *Kelly*, 94 Am. Dec. 742; effect of: *Green* v. *Hamilton*, 77 Id. 295, and note 302; record supporting, what insufficient: *Ashley* v. *Laird*, 77 Id. 69, note.

JUDGMENT BY DEFAULT NOT SET ASIDE unless party pays sum he has shown himself liable for: *Gregory* v. *Ford*, 73 Am. Dec. 639.

EAST TENNESSEE ETC. R. R. Co. *v.* KENNEDY.

[83 ALABAMA, 462.]

JURISDICTION — GARNISHMENT PROCEEDINGS IN ANOTHER STATE. — Where a citizen of Alabama is voluntarily within the territorial jurisdiction of Tennessee, and a judgment is there rendered against him on personal service, a suit by garnishment is properly instituted against a railroad company chartered by the latter state condemning a debt due the judgment debtor for services rendered in Alabama, and payment of the judgment against the garnishee is a complete defense to a subsequent action on the debt brought in Alabama.

DEBTS HAVE NO LOCAL SITUS, AND ARE SUABLE in any country or locality where the debtor's person may be found.

EXEMPTION LAWS OF ONE STATE CANNOT AVAIL DEBTOR in a suit instituted against him in another state; and a garnishee in the latter state cannot make the defense available to the debtor, and is under no duty to attempt it.

ACTION brought by James M. Kennedy against the appellant, a corporation chartered under the laws of Tennessee, but doing business in Alabama, and seeking to recover on account for work and labor done. Other material facts appear in the opinion.

Pettus and Pettus, for the appellant.

Sumter Lea, *contra*.

By Court, SOMERVILLE, J. The appellee, Kennedy, as plaintiff, recovered a judgment against the appellant railroad corporation, in the circuit court of Dallas County, for about fifty dollars, in September, 1887, the case being tried *de novo* on appeal from a justice's court. The amount was due for work and labor done by the plaintiff for the defendant in this state, of which the plaintiff was and is a resident.

The defense set up by the railroad company was payment. The admitted facts show that the plaintiff, Kennedy, being temporarily in the state of Tennessee, which was the residence of the defendant corporation where it was chartered, was there sued by one Kane, before a justice of the peace having jurisdiction of the subject-matter and the parties, and after service of process upon him, a judgment was rendered against him for the debt claimed, with costs, amounting to about fifty dollars; that after a return of no property found against Kennedy, a suit by garnishment was instituted on the judgment against the railroad company, and on its answer as garnishee a judgment was rendered condemning this same debt, and that this judgment had been fully satisfied.

This, we think, was a full defense to the suit. The plaintiff having gone voluntarily within the territorial jurisdiction of the state of Tennessee, was liable to be sued there as fully as if he resided in that state. His residence in Alabama was no objection to the exercise of this jurisdiction over his person: *Smith* v. *Gibson*, 83 Ala. 285; *Dearing* v. *Bank of Charleston*, 5 Ga. 497; 48 Am. Dec. 300, and note 319.

The residence of the railroad corporation being in Tennessee, it was subject to be sued there as much as a natural person would be; and this jurisdiction over it could in no manner be affected by the fact that its road was operated in Alabama, and the debt garnished was created here. The debt was due by the railroad to Kennedy as much in Tennessee as in Alabama, and suit could certainly have been brought upon it by him in that state, where the defendant corporation had been chartered, and where it resided. Debts have no local *situs*, but are suable in any country or locality where the debtor's person may be found: Drake on Attachment, 6th ed., sec. 597; *Sturtevant* v. *Robinson*, 18 Pick. 175.

The exemption laws in Alabama, which are municipal in their nature, are local, and have no extraterritorial force or operation. They pertain to the remedy, and depend upon the law of the forum, or the place where the action is brought.

No rule of interstate comity requires their enforcement in a foreign jurisdiction. The Tennessee courts were under no obligation to enforce them in a suit within the jurisdictional limits of that state, it being settled that the exemption laws of one state cannot avail a debtor in a suit instituted against him in another state: *Stevens* v. *Brown*, 20 W. Va. 450; *Leiber* v. *Union Pacific R. R. Co.*, 49 Iowa, 688; *Sturtevant* v. *Robinson*, 18 Pick. 175; Drake on Attachment, sec. 597; Waples on Attachment and Garnishment, 528. If Kennedy had appeared before the Tennessee court and pleaded his exemption under the Alabama statute, it would have constituted no defense. For this reason, the garnishee could not have made the defense available for him, and was under no duty to attempt it: *Moore* v. *Chicago etc. R. R. Co.*, 43 Iowa, 385; *Newell* v. *Hayden*, 8 Id. 140. If this were not the law, it is manifest that the garnishee would be subjected to a double liability in all cases of this kind, which cannot comport with justice.

The case of *Louisville etc. R. R. Co.* v. *Dooley*, 78 Ala. 524, is clearly distinguishable from this. There the debt sought to be attached was contracted by a foreign corporation in another state, and was due to one of its employees, who was a resident of Kentucky. It was held that the Alabama court had no jurisdiction of the *res* or subject-matter which it was sought to condemn, nor of the person of the garnishee, by reason of its non-resident character,—the statute making no provision for serving process on a foreign corporation, to reach a debt not capable of being brought under the control of the court.

The court erred in sustaining a demurrer to the second plea of the defendant, and in refusing to give the written charge requested by defendant's counsel. The other rulings are immaterial, and need not be noticed.

Reversed and remanded.

GARNISHEE, JUDGMENT AGAINST, EFFECT OF: *Adams* v. *Filer*, 73 Am. Dec. 410, and note 421; protects garnishee from further liability when he goes into another state: *Molyneux* v. *Seymour*, 76 Id. 662.

EXTRATERRITORIAL EFFECT OF EXEMPTION LAWS: *Mumper* v. *Wilson*, 2 Am. St. Rep. 238, and note 240–242.

IRON AGE PUBLISHING CO. *v.* WESTERN UNION TELEGRAPH CO.

[83 ALABAMA, 498.]

BILL IN EQUITY IN NATURE OF SPECIFIC PERFORMANCE IS DEMURRABLE FOR UNCERTAINTY and indefiniteness, where, seeking by the auxiliary force of an injunction, to prevent the breach of an alleged contract for personal services, it does not allege when nor where the contract was made, nor where to be performed, nor the consideration agreed to be paid, and fails to give the name of the defendant's agent by whom the contract was alleged to have been made.

JURISDICTION OF NON-RESIDENTS IS MATTER OF STATUTORY CREATION and regulation, and under the provisions of the Alabama statutes there is no jurisdiction in equity to enforce the specific performance of a contract for personal services made with a foreign corporation, or to prevent its breach by process of injunction against resident defendants, the bill failing to aver with sufficient certainty that the contract was made in Alabama, or was to be performed within its jurisdiction.

WANT OF JURISDICTION OF FOREIGN CORPORATION, an indispensable party defendant, may properly be taken advantage of by demurrer, or motion to dismiss, when the defect of jurisdiction appears on the face of the bill, and the question is raised by a co-defendant, but a plea to the jurisdiction would be proper for the foreign corporation itself.

COURTS OF EQUITY WILL DECLINE JURISDICTION TO DECREE SPECIFIC PERFORMANCE OF CONTRACT FOR PERSONAL SERVICES involving the exercise of special skill, judgment, and discretion, continuous in their nature, and running through an indefinite period of time; and injunctions to prevent the breach of such contracts are granted with great caution by the courts, although the remedy by damages at law may be inadequate.

CONTRACTS, IN ORDER TO BE ENFORCED BY SPECIFIC PERFORMANCE, must be mutual in obligation as well as in remedy. The rule is, that equity will not enforce the performance of continuous duties, involving personal labor and care of a particular kind, which the court cannot superintend.

BILL in equity in nature of specific performance. The opinion states the case.

Smith and Lowe, and Taliaferro and Smithson, for the appellant.

Webb and Tillman, J. J. Altman, and Martin and McEachin, contra.

By Court, SOMERVILLE, J. The bill is one in the nature of specific performance, seeking, by the auxiliary force of an injunction, to prevent the breach of an alleged contract by the New York Associated Press selling, as is insisted, to the complainant—the Iron Age Publishing Company—an exclusive right to receive and publish, at Birmingham, Alabama, all of the Associated Press dispatches gathered and prepared for the

press by the New York company, and transmitted over the telegraph lines of the Western Union Telegraph Company, which body corporate is also made a party defendant to the bill. The breach complained of is averred to be the delivery of these dispatches, for publication, to the Morning Herald Publishing Company, and the News Publishing Company, which companies publish a daily paper in the city of Birmingham, and are also made parties defendant to the present suit.

The chancellor sustained a demurrer to the bill, and the complainant brings this appeal. Some of these grounds of demurrer we proceed to discuss.

1. The first which we notice is based on the alleged uncertainty of the contract as set out in the third paragraph of the bill. The rule of law as to pleadings on this subject is more stringent in bills for specific performance than in other cases. The terms of the contract must be distinctly alleged, so as to leave none of its essential details in doubt or uncertainty. Vagueness of statement, or indefiniteness, as to matters of substance, is not permitted. Facts must be clearly stated, not left to inference by the court. So, in like manner, the proof is required to be clear, definite, and satisfactory; and a strict correspondence must exist between the alleged terms of the contract and the proof seeking to establish it: *Derrick* v. *Monette*, 73 Ala. 75. The contract, in other words, which the court is asked to enforce, must be alleged and proved to be "reasonably certain as to its subject-matter, its stipulations, its purposes, its parties, and the circumstances under which it was made": 3 Pomeroy's Eq. Jur., sec. 1405. Unless the court be fully advised as to what particular obligations the parties have undertaken to assume, and what specific rights they have mutually stipulated to confer, it would be impossible to adjudge whether the contract is sufficiently fair, just, and equitable in its parts, to justify its enforcement by the strong arm of the court, or to render a decree intelligibly settling the rights and duties of the parties which the court is asked to enforce.

The contract averred to exist between the complainant and the New York Associated Press does not seem to us to possess these requirements. It is not stated with sufficient definiteness, if at all, when the contract was made, nor where it was entered into, nor where to be performed, whether in or out of the state of Alabama,—a fact material to the inquiry of jurisdiction. While it is alleged to have been made with an agent

of a non-resident defendant, the bill fails to give the name of the alleged agent, that issue may be taken on the fact of his authority. The consideration agreed to be paid by the complainant is not alleged, except that it was a "good and sufficient consideration," and that the complainant had paid large sums of money, ranging from forty to eighty-five dollars per week. The subsequent averment, in another part of the bill, that the complainant had paid the amount provided for in the agreement, leaves the court to struggle by inference to frame the contract by putting together these several parts. We are of opinion that the description of the contract is not sufficiently certain in these, and, it may be, some other particulars, to justify the intervention of a court of equity for its specific enforcement.

2. The objection is further taken by the telegraph company and the publishing companies, that the facts stated in the bill show *prima facie* a want of jurisdiction of the case, because the contract sought to be enforced was made by the New York Associated Press, and the bill shows on its face that this defendant, being an indispensable party, is a non-resident corporation, against which, in the absence of appearance, it is impossible for the court to proceed. It is too plain for argument, that this foreign corporation is an indispensably essential party, and that unless jurisdiction can be obtained of its person, either constructively under statutory provisions, or by voluntary appearance, the case must speedily end in a dismissal of the bill.

3. The whole subject of jurisdiction of non-residents is one of statutory creation and regulation. Our statutes make no distinction in this particular between non-resident natural persons and foreign corporations. There are but two general classes of cases where they are allowed to be sued in the courts of Alabama. The first is by process of attachment at law, under like circumstances and in like manner as against natural persons residing without the state: Code 1876, sec. 3263. The other is in any case in equity arising under subdivision 2 of section 3753 of the Code of 1876, designated as section 3414 of the present Code of 1886, which confers jurisdiction on courts of chancery against non-residents, in four particular classes of cases: 1. When the object of the suit concerns an estate of, or lien or charge upon, lands within this state, or the disposition thereof; or 2. Any interest in, title to, or encumbrance on personal property within this state; or 3. When the

cause of action arose in this state; or 4. When the act on which the suit is founded was to have been performed in this state. The jurisdiction as thus conferred is plainly statutory and limited; and the general rule being that a foreign corporation cannot be sued unless it voluntarily appears to defend, it being impossible for the court to extend the arm of its process into a foreign state or territory, for the purpose of reaching it, it follows that the bill cannot be retained, unless the case made by it falls within the statute, or else it is made to appear that this objection has been obviated by an actual appearance of the defendant, so as to confer jurisdiction of its person: *Sayre* v. *Elyton Land Co.*, 73 Ala. 85; *Galpin* v. *Page*, 18 Wall. 350; Field on Corporations, Wood's ed., sec. 329, note 3; *Camden etc. Co.* v. *Swede Iron Co.*, 32 N. J. L. 15; Freeman on Judgments, 3d ed., secs. 567, 568.

The present case concerns neither land nor personal property, but a contract for personal services. As we have above said, the bill fails to aver with sufficient certainty that the contract arose in this state, or was to be performed within its jurisdiction. The place where it was made, whether New York or Alabama, is not stated. Nor does it appear from the bill with sufficient particularity that the telegraphic dispatches were, under the contract, to be delivered to the complainant, by the New York Associated Press, at Birmingham, through the agency of the telegraph company, or only to the latter company in New York, to be by them transmitted to complainant as complainant's agent, without further liability on the part of the associated press. The bill thus fails to bring the case within the class specified by the statute, and therefore shows no jurisdiction in chancery.

4. The question of jurisdiction, as we have seen, is raised by demurrer of the resident defendants,—the telegraph company and the publishing companies. If the New York company had attempted to raise it, the appropriate and better mode would no doubt have been by plea to the jurisdiction: *Camden etc. Co.* v. *Swede Iron Co.*, 32 N. J. L. 15. But in this case, where the granting and perpetuation of the injunction prayed for is the whole case made by the bill, we think it eminently proper that the question should be raised by demurrer, or motion to dismiss, when the defect of jurisdiction appears on the face of the bill, and is raised by a co-defendant. It is said that the court cannot inspect the bill, and from it know that the foreign corporation has not appeared.

To this it may be answered that the bill itself shows that an indispensable and leading party, whose rights are prejudiced by the injunction, and in whose absence no decree of any kind can be rendered, had not been brought before the court by reason of the impossibility of reaching it by process. There is no presumption that the New York corporation, chartered by and domiciled in a foreign state, will leave that territory, where it is alone suable, and respond to proceedings in Alabama, where it is not suable. If the complainant is entitled to an injunction, based only on the contrary presumption, he must show by the bill a case in which an injunction can be equitably and properly granted,—such a one as would be binding on the non-resident party, and enforceable in some mode known to chancery procedure. A *brutum fulmen* is no more to be tolerated in courts than in any other forum charged with the responsibility of preserving their own respect. Nor, when the case made by the bill fails to authorize the extraordinary process of injunction, can the court grant it upon the speculative contingency that the parties, by subsequent appearance, may make a case where its action would be justified. "No sovereignty," says Mr. Story in his Conflict of Laws, "can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such person or property in any other tribunal": Story on Conflict of Laws, 539. Says another author, touching the same subject: "The authority of every judicial tribunal, and the obligation to obey it, are circumscribed by the limits of the territory in which it is established": Burge's Commentaries on Colonial and Foreign Law, 1044.

The facts of the bill show that the court has no such jurisdiction of the Associated Press as to authorize the issue of the injunction asked. The case thus falls within the general rule, that whenever any ground of defense is apparent on the face of the bill itself, either from matter contained in it, or from any defect in its frame, or in the case made by it, the proper mode of defense is by demurrer: Adams's Equity, 333 et seq.; Story's Eq. Pl., secs. 473, 646; Mitford and Tyler's Equity Pleadings, 202, 311; Robinson's Elementary Law, secs. 285, 337.

The case of *Manning* v. *State of Nicaragua*, 14 How. Pr. 517, cited by appellant's counsel, to say nothing of its questionable soundness, differs from this case in not being one

where an injunction was asked, the court regarding the suit as one inviting a foreign state to appear and defend. Here the court is requested to assume jurisdiction *in limine*, before the appearance of the non-resident party chiefly affected by the issue of the writ, and to tie the hands of all parties until the final hearing. This, on the facts stated in the bill, the court has no power to do, the case not being one of the class specified in the statute: Code 1876, sec. 3753.

5. A further question of great importance arises under the issue made by the eighth assignment of demurrer. Is the contract in question one which in its nature is practicable to be enforced by a court of equity, so as to do substantial justice to both of the contracting parties, the Iron Age Publishing Company, and the New York Associated Press, admitting, for the sake of argument, the jurisdiction by the court of the subject-matter and the parties? It is insisted for the appellees that the contract being one for the performance of personal services by the Associated Press, involving the exercise of special skill, judgment, and discretion, and which are continuous in their nature, running through an indefinite period of time, the enforcement by specific performance is impracticable, and jurisdiction must be declined.

It is unquestionable that the courts of equity will not intervene to affirmatively compel specific execution in cases of this kind, because this is impracticable, the only power of the court being at most to punish the defendant by fine and imprisonment for refusing to obey its mandates: *Clark's Case*, 12 Am. Dec. 213, and note 217; *Marble* v. *Ripley*, 10 Wall. 339; Pomeroy on Contracts, sec. 310. And in many cases the courts have refused to interfere by injunction, or otherwise, to prevent the breach of such contracts, although the remedy by damages at law was not adequate. This is put on the ground that if the court was unable to enforce the affirmative part of a contract, it would refuse to restrain the violation of the negative part of it. The subject has been elaborately discussed both in England and in this country, chiefly in cases where injunctions have been sought to prevent the breach of agreements made by operatic singers and theatrical performers, to sing or perform exclusively for one employer during a given period of time. In the earlier cases in England, commencing with the leading case of *Kemble* v. *Kean*, 6 Sim. 333, it was held that for the breach of such contracts, except in certain cases of partnership, the complaining parties must

seek their remedy at law, and that chancery would decline to interfere by injunctive relief. The authority of this case, and others following it, has, however, been entirely overthrown, and in the case of *Lumley* v. *Wagner*, 1 DeGex, M. & G. 604, 13 Eng. Law & Eq. 252, the contrary doctine was established, and has since been firmly adhered to by the English courts. In that case, the defendant agreed to sing at the plaintiff's theater on certain terms, and for a stipulated time, and during such period to sing nowhere else. She made an engagement during this time to sing at a rival theater, and refused to perform her contract with the plaintiff. Although unable to enforce the contract specifically, the court did not hesitate to interfere by injunction to prevent the violation of the negative stipulation, by which the defendant bound herself not to sing anywhere else than at the plaintiff's theater. This case expressly overruled *Kemble* v. *Kean*, *supra*, and other decisions following it. The principle was soon extended, and like relief granted in cases where the negative promise was not express, but implied from the contract of the parties: Anson on Contracts, 2d Am. ed., 1887, p. 413, and note 1; 3 Pomeroy's Eq. Jur., sec. 1343; Pomeroy on Contracts, secs. 310, 311, 24, 25.

The American courts have generally been disposed to follow the rule declared in *Kemble* v. *Kean*, *supra*, and, as said by Mr. Pomeroy, they have exhibited a strange disinclination to adopt the modern English rule declared in *Lumley* v. *Wagner*, *supra*, enforcing the specific performance of such contracts negatively by means of injunction restraining their violation. The American cases are divided, however, on this subject, with a numerical weight of authority, perhaps against the later English rule, but, as we apprehend, with a disposition recently to fall into line with the more reasonable doctrine of *Lumley* v. *Wagner*, *supra*. We leave this important question open, however, as we shall decide the case upon another point, conceding for the purposes of this case the right and propriety of exercising such jurisdiction at the instance of the complainant. Injunctions of this character, especially under the American rulings, are granted with great caution by the courts. We cite the followlowing authorities on the subject, all of which we have examined with many more: *Singer Sewing Machine Co.* v. *Union etc. Co.*, 1 Holmes, 253; *Hayes* v. *Willis*, 11 Abb. Pr., N. S., 167; *Western Union Tel. Co.* v. *Union Pac. R'y Co.*, 1 McCrary, 558; *Daly* v. *Smith*, 49 How. Pr. 150; *Fredericks* v. *Mayer*, 13 Id. 566; *Clark's Case*, 12 Am. Dec. 213, note 217; *Casey* v.

Holmes, 10 Ala. 776; *Hamblin* v. *Dinneford*, 2 Edw. Ch. 529; *Sanguirico* v. *Benedetti*, 1 Barb. 315; *Butler* v. *Galletto*, 21 How. 465; *De Pol* v. *Sohlke*, 7 Robt. 280; *De Rivafinoli* v. *Corsetti*, 4 Paige, 270; *Ford* v. *Jermon*, 6 Phila. 6; *Port Clinton R. R. Co.* v. *Cleveland etc. R. R. Co.*, 13 Ohio St. 544; 3 Pomeroy's Eq. Jur., sec. 1344; Pomeroy on Contracts, secs. 24, 25, 310, 311; Anson on Contracts, 413; *Hahn* v. *Concordia Society*, 42 Md. 460; Waterman on Specific Performance, sec. 117, and notes; *Caswell* v. *Gibbs*, 33 Mich. 331; Kerr on Injunctions, *503; Hilliard on Injunctions, 485–486; *Manhattan etc. Co.* v. *New Jersey etc. Co.*, 23 N. J. Eq. 161.

6. There seems to be one feature about the present contract, however, which renders it impracticable to be specifically enforced with justice to both parties. This is its want of mutuality, both of the obligation and of the remedy as to one of its features. From the averments of the bill it is made to appear that the contract in question is to remain in force only so long as the complainant shall continue to act as agent and correspondent of the Associated Press at Birmingham. It is not shown whether this duty was assumed forever, for any definite period, or might terminate at will. In either contingency, we are unable to see how the court is to compel performance on the part of the complainant.

The general rule, to which it is true there are many exceptions, seems to be that contracts, in order to be enforced by specific performance, must be mutual in obligation as well as in remedy. Mr. Pomeroy says, and such we think is the general rule, that "it is a familiar doctrine that if the right to the specific performance of a contract exists at all, it must be mutual; the remedy must be alike attainable by both parties to the agreement": Pomeroy on Contracts, secs. 162–165. With some established exceptions, it may be stated that equity will decline to enforce a contract against a defendant where the case is of such a nature that the court has no power to compel the complainant to perform his part of it: *Moon* v. *Crowder*, 72 Ala. 79; *Irwin* v. *Bailey*, 72 Id. 467; 3 Brickell's Digest, p. 361, secs. 421, 422; Fry on Specific Performance, 286; *Cooper* v. *Pena*, 21 Cal. 404; *Duvall* v. *Meyers*, 2 Md. Ch. 401; *Richmond* v. *Dubuque etc. R. R. Co.*, 33 Iowa, 423; *Marble Co.* v. *Ripley*, 10 Wall. 359; *Meason* v. *Kaine*, 63 Pa. St. 335; *Rogers* v. *Saunders*, 10 Me. 92; 33 Am. Dec. 635. There are many unilateral contracts which constitute an exception to this rule, including the right to exercise certain options, and

cases affected by the statute of frauds, to say nothing of others, which stand on peculiar principles. This case is not of that class: *Richards* v. *Green*, 23 N. J. Eq. 536; *Heflin* v. *Milton*, 69 Ala. 354; Pomeroy on Contracts, secs. 167–174; 2 Lead. Cas. Eq. 1077.

How, it may be asked, is it practicable for the court to compel the complainant to perform personal services as agent and correspondent of the Associated Press at Birmingham, which it has contracted to perform from year to year, under this agreement? We have seen that the duty involves the exercise of special skill, judgment, and discretion, being intellectual as well as mechanical in its character. These duties are also continuous in their nature, and of indefinite duration. There can be, as we have shown, no specific performance affirmatively of such duties by a court of equity. The most that can be done is to negatively enforce them by injunction prohibiting their breach, and this only on bill filed praying such particular relief.

It is clear that but one of two decrees can be rendered in this case: 1. We can tie the hands of the Associated Press and the other defendants by injunction, forbidding the delivery of the press dispatches to any one else than the complainant, as prayed for, and leave the complainant free to terminate the contract at its will without limitation of time or circumstance, or to perform its duties as correspondent as negligently or diligently as discretion may dictate; or 2. To keep the injunction in force so long as the duties imposed by the contract shall be faithfully performed by complainant, which may be for all time to come, in view of the possible perpetuity of complainant's corporate existence. The first degree suggested would be entirely opposed to all equity precedents and practice; the settled rule being that the courts will not interfere by injunction in cases of this kind, if, indeed, in any case where defendant cannot be made secure in his rights and remedies for violation of the duties imposed on the complainant by the contract sought to be enforced: *Bromley* v. *Jeffries*, 2 Vern. 415; *Richmond* v. *Dubuque etc. R. R. Co.*, 33 Iowa, 422, and cases cited on page 486.

The second decree above suggested would also be impracticable, not only for the reason that the court cannot compel the performance of the personal services assumed to be undertaken by the complainant, involving as they do the exercise of special skill, judgment, and discretion, but it would be out

of the question for the court to keep this case open for all time, or even for an indefinite term of years, to superintend the continuous performance of these duties by the complainant. This might involve the frequent necessity on the part of the court of hearing complaints from the defendant, charging the complainant with a breach of its duties, or from the complainant, arraigning the defendant for contempt for a violation of the injunction. There would thus be no end to the number of occasions when the court might be called on, from year to year, to say whether the complainant has performed the duties in question faithfully and efficiently, so as to have kept the injunction in force, or negligently and unskillfully, so as to justify its breach. For these reasons, the rule is, that "equity will not enforce the performance of continuous duties involving personal labor and care of a particular kind which the court cannot superintend": Waterman on Specific Performance, sec. 49; *Richmond* v. *Dubuque etc. R. R. Co.*, 33 Iowa, 422; *Caswell* v. *Gibbs*, 33 Mich. 331; *Port Clinton R. R. Co.* v. *Cleveland R. R. Co.*, 13 Ohio St. 544; *Atlanta etc. R. R. Co.* v. *Speer*, 32 Ga. 550; *Blanchard* v. *Detroit R. R. Co.*, 31 Mich. 43; *Marble Co.* v. *Ripley*, 10 Wall. 339.

The contract being one which cannot be specifically enforced in a court of equity against the complainant, we deem it inequitable to enforce it against the defendants.

The demurrer to the bill was properly sustained, and the decree is affirmed.

SPECIFIC PERFORMANCE, WHEN IT WILL NOT BE COMPELLED: *Swint* v. *Carr*, 2 Am. St. Rep. 44, and note 45; *Hamilton* v. *Harvey*, 2 Id. 118, and note 123; *Goodwin Gas Stove etc. Company's Appeal*, 2 Id. 696, and note 703.

COVENANTS FOR PERSONAL SERVICES WILL NOT, AS GENERAL RULE, BE SPECIFICALLY ENFORCED: *Clark's Case*, 12 Am. Dec. 213, and note 216.

MUTUALITY OF CONTRACT IS PREREQUISITE TO DECREE FOR SPECIFIC PERFORMANCE: *Moore* v. *Fitz Randolph*, 29 Am. Dec. 208; *Rogers* v. *Saunders*, 33 Id. 635; *Bodine* v. *Glading*, 59 Id. 749.

JURISDICTION OVER FOREIGNERS, HOW OBTAINED: *Molyneux* v. *Seymour*, 76 Am. Dec. 662, and note 665–671.

WILSON *v.* HOLT.

[83 ALABAMA, 523.]

UNDER ANTENUPTIAL CONTRACT BETWEEN WIDOW AND INTENDED SECOND HUSBAND, stipulating that upon the vesting in her of a contingent remainder in certain property, which is dependent on the death of an only grandchild, "the same shall inure and belong to him [the husband], and thereafter they shall own the estate jointly and equally," an equitable interest in such remainder is acquired by the husband, the wife being seised of the legal title for his use, and this interest will descend to his heir at law upon his death after the remainder has become vested.

CONTENTS OF ANTENUPTIAL CONTRACT executed twenty years prior to the commencement of the action, and alleged to have been destroyed by the wife after the husband's death, was held to be established by testimony of the attorney who wrote the contract, and who states special circumstances calculated to impress the fact on his memory, corroborated by proof of execution by the subscribing witnesses, and subsequent declarations of the wife as to the interests of her husband in the property, in strict harmony with the other facts proved.

WHERE WILL CONFERS POWER OF SALE ON EXECUTOR, the probate court has no jurisdiction to grant an order for the sale of decedent's lands, either for payment of debts or for distribution; and when the petition for sale shows that there is a will, it must affirmatively appear that no power to sell is conferred thereby.

PURCHASER AT PROBATE SALE WHICH IS FOUNDED upon a petition which does not contain the averments necessary to give the court jurisdiction, acquires no legal title which he can convey; but he may acquire an equity enforceable against the heirs who receive their shares of the purchase-money.

WHETHER INFANT OF TENDER YEARS IS CHARGEABLE WITH NOTICE of a fact alleged in a bill to which he is made party, and which his guardian *ad litem* denies, may be questioned; but if a cross-bill is filed in the suit, to which he is not made a party, and which is afterwards dismissed without prejudice and without litigation on its merits, he is not chargeable with facts alleged in it.

WHERE LEGISLATIVE RATIFICATION OF DECREE OF DIVORCE is essential to its validity, it will be presumed from great lapse of time (here twenty-two years), taken in connection with proof that the husband married again, and lived with his second wife in the marital relation until his death.

THAT PARTIES HAD DUE NOTICE OF JUDICIAL PROCEEDINGS will be presumed after the lapse of twenty years, although the record does not affirmatively show that fact.

PARTY AGAINST WHOM DECREE OF DIVORCE IS RENDERED, in state which prohibits the subsequent marriage of a person against whom such a decree is rendered, may nevertheless contract another marriage in a state where such prohibition does not exist, and especially if he is there relieved by legislative act from all the penalties and disabilities imposed by the decree against him.

IDENTITY OF NAME IS PRIMA FACIE EVIDENCE of identity of person, and is sufficient proof of the fact, in the absence of all evidance to the contrary.

BILL to establish and enforce complainant's rights to certain property under an alleged antenuptial agreement between his father and Mrs. Chambliss, wherein it was stipulated that upon the vesting in her of a contingent remainder in certain property which was dependent upon the death of an only grandchild (who afterwards died), the same should inure and belong to the husband, plaintiff's father. The remaining facts are stated in the opinion.

Troy, Tompkins, and London, and Watts and Son, for the appellant.

Sayre and Graves, Rice and Wiley, and Williamson and Holtzclaw, for the respondents.

By Court, SOMERVILLE, J. 1. If the marriage contract, alleged in the bill to have been executed antenuptially between Mrs. Chambliss and Dr. R. S. Wilson, on November 11, 1861, be satisfactorily proved by the testimony, it created an equitable title in favor of said Wilson to an undivided one half of the land in controversy which he subsequently held as a tenant in common with her, although she was his wife. This was decided on the last appeal of this cause: *Holt* v. *Wilson*, 75 Ala. 58. The complainant shows that he, as the sole surviving heir, is entitled to this interest of his father, if anything.

2. A strongly controverted issue is the existence of this alleged contract. That a marriage contract of some kind was executed between the contracting parties on the day of and just before the marriage seems to us to be very certain. This is proved by the witness Elliott, who was present at the ceremony of the wedding, and by request signed the contract as one of the attesting witnesses; his wife, now deceased, according to his best recollection, being the other witness. He was at the time in the employment of Mrs. Chambliss, supervising her plantation as overseer. It is quite natural that his presence should have been invoked for such a purpose. We see nothing to cast suspicion on his testimony, and there is much in the record, as we shall show, to corroborate the probability of its truth. A more difficult inquiry is as to the certainty of the contents of this agreement. It is proved that just before this marriage Dr. Wilson procured a marriage contract to be drawn up by Colonel Troy, then and now a practising attorney at the Montgomery bar. The contents of this agreement

are proved with great precision by Mr. Troy, and he gives reasons for his retentive recollection of its purport, which seem to us very satisfactory. The interest acquired by Dr. Wilson under this contract was a contingent remainder in an undivided one-half interest in the estate of David Chambliss, devised by him to his infant granddaughter, with a remainder to Mrs. Chambliss, his widow, upon a contingency which has since happened. The will of the testator shows the exact nature and *quantum* of this interest thus bargained for. It was a fact to excite the attention of any intelligent lawyer, that the bargainee should acquire such a peculiar interest, in view of assuming towards the infant the relation of a step-father. So striking is this feature of the contract, that it is made one of the grounds upon which to assail the validity of the transaction in the argument of the present case. The only other term of the instrument prepared by Mr. Troy was one easy to be remembered,—that in the event of the granddaughter, Sallie David Chambliss, surviving Dr. Wilson, she should be entitled to share in his estate as one of his heirs. Another cogent fact is stated, which refreshes the witness as to the terms of this agreement. He had occasion a few years after he had prepared it to redraft the substance of it, which he used in a certain cause then pending in the chancery court of Montgomery; and that paper was accessible to him, as another most satisfactory mode of strengthening his remembrance of the facts. The only serious question connected with this branch of the case is, whether the instrument prepared by Colonel Troy, at the request of Dr. Wilson, was the one shown to have been executed in the presence of the witness Elliott.

Supposing that the parties intended to execute such a contract, it is not improbable that the aid of an expert would be invoked to prepare it; that the expected husband, not the wife, would see to its preparation, and that he would have incorporated in it what had already been agreed upon between the parties. There is an extreme absence of all suspicion that this portion of the *res gestæ* attending the transaction was not entirely *bona fide*, and free from the appearance of any unfair contrivance. It would seem, therefore, not to require the most cogent evidence that the instrument thus carefully prepared was the one actually signed. This evidence is furnished by the coincidence of the entire testimony from beginning to end, and especially by the repeated admissions of Mrs. Chambliss, which are clearly admissible as declarations against in-

terest, if not explanatory of her possession of the property in controversy: *Humes* v. *O'Bryan*, 74 Ala. 64. She is proved to have declared on sundry occasions during the life of Dr. Wilson that he had an interest in her estate, lands, and slaves, and to have admitted after his death that his children would get a part of the property. The decided weight of the testimony is, that this was a half-interest,—the precise amount covered by the marriage contract proved to have been prepared by Colonel Troy. The credibility of the several witnesses who testify as to these admissions is assailed as improbable and unworthy of belief, especially of the colored witnesses, who were former slaves. It is said not to be credible that they would remember for fifteen or twenty years declarations of this kind made by their former mistress. It must be remembered, however, that the marriage contract in question conferred on Dr. Wilson an undivided interest in the slaves of Mrs. Chambliss, as well as in her lands. What is more natural or probable than that the wife would inform her slaves as to their ownership,—who their master was to whom they owed obedience? Even "the ox," we are told, "knoweth his owner." How much more should a reasonable being in lawful bondage know and remember this fact? There is, to our minds, nothing improbable in the fact that these witnesses should remember with distinctness the announcements made to them by their mistress as to their change of ownership. It was a fact that was likely to deeply impress them, constantly to be meditated on, and not likely ever to be forgotten. We are much impressed with the air of truth which pervades the testimony of these former slaves, and its coincidence with not only intrinsic probability, but, we repeat, with all the facts of this case from beginning to end.

3. The existence of this marriage contract, as we have said, created an equity in the lands in controversy, in favor of Dr. Wilson, to the extent of an undivided one-half interest. This title has devolved by inheritance on the complainant, and makes a *prima facie* case of recovery for him in this suit. To overcome this, the defendants rely on a sale of the lands made by one Noble, as administrator *de bonis non* with the will annexed, of the estate of Mrs. Chambliss, on January 8, 1877, under an order of the probate court of Montgomery County. The validity of these proceedings becomes, therefore, of importance.

It is contended that the probate court obtained no jurisdic-

tion of the case, and had no authority to sell the lands, because the petition made to that court showed that there was a will made by Mrs. Chambliss, and yet failed to show that no power of sale was given by the will. Is this a jurisdictional allegation in an application made to sell lands for distribution among devisees, the fact appearing in the petition that there is a will? It is admitted that such is the case, where the application is made by an executor or administrator with the will annexed, to sell lands for the payment of debts: Rev. Code 1867, sec. 2079. Whatever doubt there might be on the subject, were the question a new one, we regard the proposition as settled, that where the will confers a power of sale, the probate court has no jurisdiction to order a sale of the lands for distribution among the heirs, any more than for the payment of debts. Such a power of sale, under the statute, passes to an administrator with the will annexed, who is required to execute it: Rev. Code, sec. 1609. The will thus became a law to the court, and a limitation upon its jurisdiction. In *Brock's Administrator* v. *Frank*, 51 Ala. 85, decided in 1874, we held this kind of power to be a limitation upon the jurisdiction of the probate court; in other words, that the fact in question was a jurisdictional one. "Such jurisdiction," it was there said, "can only arise when the testator dies intestate as to lands, or when no power of sale is given in the will, and a division among the devisees is necessary": See also *Meadows* v. *Meadows*, 73 Id. 356; *Ala. Con. M. E. Church* v. *Price*, 42 Id. 49.

4. The jurisdiction of the probate court, in making such a sale, being purely statutory and limited, the facts showing the jurisdiction must be stated in the application asking the sale; and so far does this principle prevail, that nothing is presumed to be within the jurisdiction of a court of this character except what is expressly alleged and affirmatively appears on the record: *Robertson* v. *Bradford*, 70 Id. 385, and cases cited. It follows from this principle, that when the petition shows the existence of a will, it should negative the conferring by it of a power to sell; for it is only in the contingency of the non-existence of such power that the probate court has jurisdiction to sell.

The petition filed by Noble, under which the present lands were sold, was fatally defective in failing to contain this jurisdictional averment. The probate court, therefore, acquired no jurisdiction to sell, and the attempted sale made under the void order was itself void, conferring no legal title on the pur-

chasers. If the purchasers at this sale got nothing more than an equity, they could transfer no better title than they had acquired, all subpurchasers being charged with notice of the defect in the probate court proceedings, which was matter of public record. Sharpe, for this reason, occupied no better vantage-ground than the Gibsons; and they, at most, acquired only an equity against such of the distributees as received their share of the purchase-money.

5. The complainant was not one of these; and his equity being first in point of time would be first in right. It is only the purchaser of a legal title who can claim to be protected as a *bona fide* purchaser for value without notice of prior equities.

It is unnecessary for us to decide the question as to how far a *bona fide* purchaser for value of the legal title, acquired at a judicial sale made under an order of the probate court, will be protected against secret equities attaching to the title. It may be doubted in such cases whether the rule of *caveat emptor*, which applies to judicial sales, will go further than to cover those defects which may be disclosed by an examination of the chain of title; or, at least, whether it would cover such secret equities as no ordinary diligence could discover: Code 1876, sec. 2200; *McMillan* v. *Preston*, 58 Ala. 84; *Banks* v. *Ammon*, 27 Pa. St. 172; *Le Neve* v. *Le Neve*, 2 Lead. Cas. Eq., 3d Am. ed., p. 195; *Basset* v. *Nosworthy*, 2 Id. 69, 72; *Ohio L. & T. Co.* v. *Ledyard*, 8 Ala. 873; Freeman on Execution, secs. 336, 509; Rorer on Judicial Sales, sec. 462; *Whelan* v. *McCrary*, 64 Ala. 328; *Prince* v. *Prince*, 67 Id. 565; *Fore* v. *McKenzie*, 58 Id. 115; *Perkins* v. *Winter*, 7 Id. 855; *Bailey* v. *Timberlake*, 74 Id. 221, 225.

6. We find nothing in the record which imputes laches to the complainant in the commencement of this suit. The testimony shows a remarkable degree of diligence in the prosecution of his rights, and no negligence in the discovery of them. Nor is there any substantial want of correspondence in the allegations and proof on this point. We have held the allegations of the bill sufficient, and the proof is, if any thing, stronger than these allegations, on the question of diligence: *Holt* v. *Wilson*, 75 Ala. 58.

7. It is sought, however, to charge the complainant with notice of the existence of the marriage contract, by reason of a bill in chancery filed by Mrs. Wilson in February, 1866, to which the complainant was made a party defendant, his co-defendants being his sister Alice, now deceased, and the

administrator of Dr. Wilson. Complainant was then a minor, about eleven years of age. He was represented in that suit by a guardian *ad litem*. His co-defendant set up the marriage contract, in a cross-bill against Mrs. Wilson, which was, however, dismissed without prejudice. It may be questioned whether a minor of such tender years can be charged with notice of a fact in this manner, by stating it in a bill, the allegations of which his guardian *ad litem* is compelled by law to deny. But the minor was never made a party to the cross-bill, and the issues growing out of the marriage contract were never litigated in the suit with any one, by reason of the dismissal of this cross-bill. On no sound principles, therefore, can it be held that complainant had such notice of this contract as to impute negligence to him for failing to know and pursue his legal rights secured to him under its provisions.

8. It is further argued that the marriage between Dr. Wilson and Mrs. Chambliss was illegal and void, on the ground that he was at the time already a married man, undivorced from a wife then living in Georgia. A full answer to this suggestion is the decree of divorce rendered in Wilson's favor by the chancery court of Montgomery County, on February 22, 1861, the record of which is introduced in evidence, if that decree be sustained as valid. Its validity is assailed on the ground that, under the provisions of the constitution of Alabama then in force, no decree for divorce could have effect until sanctioned by two thirds of both houses of the general assembly it being made by statute the duty of the register in chancery to make out and transmit the record of the suit to the speaker of the house of representatives: Const. 1819, art. 4, sec. 13; Code 1852, sec. 1978. The evidence in this case showing no such legislative sanction, it is claimed that the divorce proceedings are for all purposes ineffectual. This conditional divorce was granted more than twenty years before the commencement of this suit. It is shown that the parties were married in due form, and lived together as husband and wife for many years, until the death of one of the parties. It will be presumed, therefore, in view of this great lapse of time, that the requisite sanction was given by the general assembly to the decree of divorce granted by the chancery court. Almost any reasonable presumption of fact will be conclusively indulged, in order to sustain rights asserted under a decree which is twenty years old. And reasons of public policy especially favor the application of this principle

to uphold the validity of marriages: *Matthews* v. *McDade*, 72 Ala. 377; *Long* v. *Parmer*, 81 Id. 384, 388, and cases cited; *Bozeman* v. *Bozeman*, 82 Id. 389; 1 Bishop on Marriage and Divorce, sec. 13; *McCarty* v. *McCarty*, 2 Strob. 6; 47 Am. Dec. 565; *Carroll* v. *Carroll*, 20 Tex. 731; *Dickey* v. *Vann*, 81 Ala. 425.

9. In addition to this, the complainant relied upon the record of a divorce suit obtained against Dr. Wilson by his first wife, in the state of Georgia, in the year 1859. Whatever force there might otherwise be in the objection that the record of the proceedings shows no service on the defendant, and other like objections, the presumption, after the lapse of twenty years, is in favor of every judicial tribunal acting within its jurisdiction, and that all parties concerned had due notice of its proceedings: 1 Greenl. Ev., 14th ed., sec. 19.

10. It is said that the laws of Georgia prohibited the guilty party from marrying again, and for this reason the marriage of Dr. Wilson in Alabama was illegal. But it is settled in this state that such a prohibition had no extraterritorial operation, and that, notwithstanding the prohibition, the guilty party would be competent to marry in the state of his or her residence: *Fuller* v. *Fuller*, 40 Ala. 501; *Reed* v. *Hudson*, 13 Id. 570. The act of the general assembly of Alabama, approved February, 1861, "for the relief of Robert S. Wilson," conferred this right, by declaring him to be "relieved of all the penalties and disabilities which by law attach to persons from or against whom a divorce had been ordained in any state." The disability of contracting marriage in Alabama, if it existed, was thus expressly removed by a law, which does not seem to have been obnoxious to any constitutional objection.

11. The identity of name in this act with that of the complainant's father, who was then a resident of Montgomery County, Alabama, is *prima facie* evidence of identity of person. Such is the rule, unless a name is shown to be very common in a country, or unless there be other facts which throw confusion on the supposed identity: Wharton on Evidence, sec. 701.

The other points urged are not, in our judgment, well taken.

The decree of the chancellor, under these views, is erroneous, and will be reversed, and the cause remanded.

EFFECT OF DECREE OF DIVORCE AND OF PROHIBITION TO MARRY: See note to *Boykin* v. *Rain*, 65 Am. Dec. 349.

CASES

IN THE

SUPREME COURT

OF

NEVADA.

STATE *v.* LINDSEY.

[19 NEVADA, 47.]

JURY MAY FIND PRISONER GUILTY OF MURDER IN SECOND DEGREE for a homicide committed by means of poison, for the reason that the question of degree is to be settled by them under the statute of Nevada, which provides that "all murder which shall be perpetrated by means of poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, ... shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree."

JURY HAVE POWER TO FIX CRIME OF MURDER IN SECOND DEGREE when it ought, under the law and the facts, to be fixed in the first degree.

IF JURY FIX CRIME OF MURDER IN SECOND DEGREE, in a case where the law and the facts make it murder in the first degree, it is an error in favor of the prisoner, of which the law will not take any cognizance, and of which he ought not to complain.

INSTRUCTIONS ARE NOT ERRONEOUS OR MISLEADING when they are to the effect that if poison was prepared by the prisoner with suicidal intent, and was negligently exposed in such a place and manner as would likely to be unconsciously or without negligence taken by the decedent, the prisoner would be "liable for the consequences," the court in the same connection stating correctly what the consequences would be.

INDICTMENT for murder, alleged to have been committed by administering poison. The jury found the prisoner guilty of murder in the second degree. The opinion states the case with the exception of certain instructions, which are as follows: "The jury are instructed that if a person exposes or places poison in such a position that it is likely to be uncon-

csiously or non-negligently taken by another person, either as food or drink, he or she is liable for the consequences. And you are further instructed that if a person, in attempting to commit suicide, unlawfully kills another, such person is guilty of manslaughter. If you believe, from the evidence in this case, beyond all reasonable doubt, that the defendant, Lizzie Lindsey, on the second day of December, A. D. 1883, purchased a poisonous substance, to wit, strychnine, with intent to take her own life; that she took it to the house where she and deceased were residing; that she put the strychnine so purchased by her into a glass of whisky; that she left said glass containing said strychnine and whisky upon a table in deceased's room, which deceased occupied, and had the right to occupy, and in such exposed situation that it was likely to attract, and did attract, deceased's attention; and if you further believe, from the evidence, beyond all reasonable doubt, that the deceased, Robert Pitcher, rightfully went into the room in which the glass containing the whisky and strychnine was, and that the said Pitcher, without any fault on his part, took, drank, and swallowed down the contents of said glass, not knowing at the time he so drank it that it contained any poison, and that the drinking of the strychnine contained in said glass caused said Pitcher's death, and that he died . . . . from the effects of drinking said poison, — then I instruct you that the defendant is guilty of manslaughter, and you should so find."

R. M. Clarke, for the appellant.

W. H. Davenport, attorney-general, and J. D. Torrcyson, district attorney, for the state.

By Court, HAWLEY, J. Appellant was indicted for the crime of murder, alleged to have been committed by the administering of poison. The jury found her guilty of murder in the second degree.

1. It is argued in her behalf that the verdict is a verdict of acquittal; that the crime alleged in the indictment was murder in the first degree; that there is no such crime under our statute as murder in the second degree for a homicide committed by means of poison. The statute of this state declares that "all murder which shall be perpetrated by means of poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be com-

mitted in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree; but if such person shall be convicted on confession in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly": 1 Comp. Laws, 2323.

Under this statute, there are certain kinds of murder which carry with them conclusive evidence of premeditation, viz., when the killing is perpetrated by means of poison, lying in wait, or torture; or when the homicide is committed in the perpetration, or attempt to perpetrate, any of the felonies enumerated in this statute. In these cases, the question whether the killing was willful, deliberate, and premeditated is answered by the statute in the affirmative, and if the prisoner is guilty of the offense charged, it is murder in the first degree: *State* v. *Hymer*, 15 Nev. 50, and authorities cited in appellant's brief. But suppose the jury, in charity for the faults and weakness of the human race, sympathy for the prisoner, or any other mistaken view of the law or the facts, lessens the offense to murder in the second degree, is the prisoner to go free? Does not the case stand precisely upon the same plane as a verdict of murder in the second degree, in any case not enumerated in the statute, where there is a willful, deliberate, and premeditated killing? Is it not as much the duty of the jury in such a case to find the prisoner guilty of murder in the first degree as in the cases specially enumerated in the statute? Suppose the jury in such a case, where the evidence is positive, clear, plain, and satisfactory beyond a reasonable doubt, regardless of all the testimony, and in violation of the well-settled principles of law, should find the prisoner guilty of murder in the second degree, would the prisoner be entitled to a new trial upon the ground that the verdict is against the evidence? Is it not a fact that juries frequently render just such verdicts, and the result cannot be accounted for upon any theory other than that of a compromise of opinion? Why should such verdicts be allowed to stand? The answer is plain. The reason is, that the statute leaves the question of degree to be settled by the

verdict of the jury. A verdict finding the prisoner guilty of murder, without mentioning the degree, would be a nullity. In *State* v. *Rover*, 10 Nev. 388, 21 Am. Rep. 745, this court, referring to the statute which we have quoted, said: "By this statute, murder is divided into first and second degrees, depending upon the particular circumstances in which the crime is committed; and whether it be of the first or second degree is a fact to be specially found from the evidence adduced, without reference to any special facts which may be stated in the indictment. In case of a trial, the jury before whom the trial is had, if they find the defendant guilty, are required to find this fact, and to designate by their verdict whether their guilt be of the first or second degree; and in case of a plea of confession, the court is required to determine this question of fact by the examination of witnesses in open court. It is therefore apparent from the plain and positive provisions of the statute that a verdict which fails to designate the degree of murder of which the jury find the defendant guilty is so fatally defective that no judgment or sentence can be legally pronounced thereon": 10 Nev. 391, 21 Am. Rep. 746.

A judge should always inform the jury of the degree which the law attaches to murder, by whatever means the crime may have been committed; but in every case it is the province of the jury, if the prisoner is found guilty, to determine and fix the degree by their verdict, and the courts cannot deprive the jury of their right to fix the degree by imperatively instructing them, in a case where the crime was committed by administering poison (or in any other case), that if they find the prisoner guilty they must find him guilty of murder in the first degree: *Robbins* v. *State*, 8 Ohio St. 193; *Beaudien* v. *State*, 8 Id. 638; *Rhodes* v. *Commonwealth*, 48 Pa. St. 398; *Lane* v. *Commonwealth*, 59 Id. 375; *Shaffner* v. *Commonwealth*, 72 Id. 61, 13 Am. Rep. 649.

Wharton, in discussing the degrees of murder, says: "But however clear may be the distinction between the two degrees, juries not infrequently make use of murder in the second degree as a compromise, when they think murder has been committed, but are unwilling, in consequence of circumstances of mitigation, to expose the defendant to its full penalties": 2 Wharton's Crim. Law, sec. 1112.

In *Rhodes* v. *Commonwealth*, 48 Pa. St. 398, the court said: "Under proper instructions from the bench, it is not only the right of the jury to ascertain the degree, but it is the right of

the accused to have it ascertained by them. . . . . No doubt cases of murder in the first degree have been found in the second, but this must have been anticipated when the statute was framed, and has certainly been observed under its operation, and yet it has remained upon our statute-book since 1794 unaltered in this regard. Possibly the very distinction of degrees was invented to relieve such jurymen's consciences as should be found more tender on the subject of capital punishment than on their proper duties under evidence. Many men have probably been convicted of murder in the second degree, who, really guilty of the higher crime, would have escaped punishment altogether but for this distinction in degrees so carefully committed by the statute to juries."

The jury have the undoubted power to fix the crime in the second degree when it ought, under the law and the facts, to be fixed in the first. "We need not speculate why it was so provided. It is sufficient that it is so written, and we cannot change, alter, or depart from it": *Lane* v. *Commonwealth*, *supra*.

Our attention has not been called to any case where a verdict of murder in the second degree has been set aside upon the ground that the testimony was such as to make the crime murder in the first degree. But, on the other hand, the direct question involved in this case has been decided adversely to appellant: *State* v. *Dowd*, 19 Conn. 388; *Lane* v. *Commonwealth*, *supra*. In the latter case, the court said: "It has never yet been decided in Pennsylvania that a verdict of murder in the second degree might not be given in a case of murder by poison. That it may be given is as unquestionable as the power of the jury is under the act to give it, and impossible for the court to refuse it."

If the jury fix the crime at murder in the second degree, in a case where the law and the facts make it murder in the first degree, it is an error in favor of the prisoner, of which the law will not take any cognizance, and of which the prisoner ought not to complain.

2. Objection is made to certain instructions given by the court, upon the theory that the poison may have been mixed with whisky with the intent on the part of the appellant to commit suicide, and was negligently exposed in such a place and manner as would likely "to be unconsciously or non-negligently taken by other persons, either as food or drink," and the jury were told that in such a case the person so leaving

the poison would be "liable for the consequences," and would be "guilty of manslaughter." This objection cannot be sustained. The use of the words "liable for the consequences," of which complaint is made, might have been error if the court had not in the same connection stated what the consequences would be; but the instructions upon this point must be considered together as an entirety, and when so considered they state a correct principle of law: Desty's Crim. Law, sec. 124 b; 2 Wharton's Crim. Law, sec. 1004; *Regina* v. *Michael*, 9 Car. & P. 356; and it is evident that the jury could not have been misled.

The judgment of the district court is affirmed.

ONE WHO, IN ATTEMPTING TO COMMIT SUICIDE, ACCIDENTALLY KILLS ANOTHER is guilty of criminal homicide: *Commonwealth* v. *Mink*, 25 Am. Rep. 109.

MURDER PERPETRATED BY MEANS OF POISON IS MURDER IN FIRST DEGREE: See note to *Whiteford* v. *Commonwealth*, 18 Am. Dec. 774; *State* v. *Pike*, 6 Am. Rep. 533, 537; *State* v. *Wagner*, 47 Id. 131; *State* v. *Wells*, 47 Id. 822.

COURT SHOULD INFORM JURY OF DEGREE WHICH LAW ATTACHES TO MURDER, but it is the province of the jury to determine and fix the degree: *Shaffner* v. *Commonwealth*, 13 Am. Rep. 649, 654; see also *Gwatkin* v. *Commonwealth*, 33 Am. Dec. 264; *State* v. *Hildreth*, 51 Id. 364; *Keener* v. *State*, 63 Id. 269; *State* v. *Ingold*, 67 Id. 283; *State* v. *Thomas*, 2 Am. St. Rep. 351.

VERDICT FINDING PRISONER GUILTY OF MURDER WITHOUT FIXING DEGREE IS BAD: *Hogan* v. *State*, 13 Am. Rep. 575; *State* v. *Rover*, 21 Id. 745; compare *Welch* v. *State*, 15 Id. 690.

BOYNTON *v.* LONGLEY.

[19 NEVADA, 69.]

PREVAILING DOCTRINE AS TO FLOW OF WATER CAUSED BY RAIN, SNOW, OR NATURAL DRAINAGE IS, that when two tracts of land are adjacent, and one is lower than the other, the owner of the upper tract has an easement in the lower land to the extent of the water naturally flowing from the upper land to and upon the lower tract, and any damage occasioned to the lower land thereby is *damnum absque injuria*. But this doctrine only applies to waters which flow naturally from such causes. The servitude of the lower land cannot be augmented or made more burdensome by the acts or industry of man.

UPPER LAND-OWNER, WHILE HAVING UNDOUBTED RIGHT TO MAKE REASONABLE USE OF WATER FOR IRRIGATION, must so use, manage, and control it as not to injure his neighbor's land by the discharge of the waste water thereon.

MERE ACQUIESCENCE OR PERMISSION ON PART OF LOWER LAND-OWNER to allow the flow of waste or surplus water in such limited quantity as did his land no injury cannot be so construed as to give the upper land-

owner a prescriptive right to increase the flow to such an extent as to damage the land of such lower land-owner.

RIGHT ACQUIRED BY PRESCRIPTION IS ONLY COMMENSURATE WITH RIGHT ENJOYED. The extent of the enjoyment measures the extent of the right. The right gained by prescription is always confined to the right as exercised for the full period of time required by the statute.

ACTION to recover damages alleged to have been caused to the plaintiff's land, by waste water flowing from the defendant's land, and for an injunction. The facts are stated in the opinion.

Clarke and King, for the appellant.

Robert H. Lindsay, for the respondent.

By Court, HAWLEY, J. This case presents an interesting question which has never been decided in this state. Appellant is the owner of certain lands which require irrigation, and the water used for this purpose flows, by the laws of gravitation, onto the adjacent and lower lands owned and cultivated by respondent. This action was instituted by respondent to recover damages to his land and crops, alleged to have been caused by the waste water flowing from appellant's land and for an injunction. The facts as found by the court, at the request of plaintiff, are as follows: "That plaintiff has been in the possession of and has cultivated all of the lands described in the complaint, except the southwest quarter of section 20, township 19 north, range 20 east, since A. D. 1862, and entered into possession of and cultivated said last-mentioned lands since 1875; that defendant entered into possession and commenced the cultivation of his said lands in part in 1869, and part in 1870; that at the time of the entry into possession and commencing to cultivate his said land, there was only about 120 acres thereof which was cleared off and ready for irrigation, leaving some 170 acres of waste and unbroken land which had never been irrigated; that at the time this action was brought, defendant cultivated and irrigated of said lands mentioned 291 acres; that defendant and his predecessors in interest procured at all times the water necessary for irrigation of said lands through an artificial water ditch, ... which conducted the waters of the Truckee River a long distance to said land, as well as waste or surplus waters from the lands of other farmers; that, prior to 1878, defendant had only the right to use 150 inches of water from said ditch; that, in 1870, he cleaned and enlarged said ditch, and in 1878,

said ditch was enlarged to its present capacity by other parties, for the express purpose of protecting the lands of plaintiff from the waste and surplus waters of other farmers; that plaintiff cultivates several hundred acres of land by means of irrigation; and that his said lands are only valuable with the proper use of water; that portions of his said lands are very flat, and the waters discharged thereon from defendant's lands cannot run off, but if so discharged, will remain standing thereon until drank up by the soil or evaporated; that, in August, A. D. 1882, the surplus or waste waters upon defendant's lands were discharged upon plaintiff's lands, and flooded and covered about forty acres thereof, and remained standing thereon to the depth of three or four inches for ten or twelve days; that plaintiff's system of drainage, and his ditches therefor, are sufficient for his own and ordinary necessities, but are insufficient to collect and control the waters from defendant's lands."

In a dry and arid climate, where irrigation is necessary in order to cultivate the soil, the question as to the rights of the proprietors of upper and lower lands in regard to the waste water has seldom arisen, because, as a general rule, the lower land-owner is willing to receive, dispose of, and profit by the use of all water flowing from the upper lands of another in irrigating his own land. It is seldom that any land-owner in this state has occasion to complain of too much water. The cry is usually, not for less, but for more. As to the flow of water caused by the fall of rain, the melting of snow, or natural drainage of the ground, the prevailing doctrine is, that when two tracts of land are adjacent, and one is lower than the other, the owner of the upper tract has an easement in the lower land to the extent of the water naturally flowing from the upper land to and upon the lower tract, and that any damage that may be occasioned to the lower land thereby is *damnum absque injuria*. Water seeks its level, and naturally flows from a higher to a lower plane; hence the lower surface, or inferior heritage, is doomed by nature to bear a servitude to the higher surface, or superior heritage, in this, that it must receive the water that naturally falls on and flows from the latter. The proprietors of the lower land cannot complain of this, for *aqua currit, et debet currere, ut solebat*. But this rule—this expression of the law—only applies to waters which flow naturally from springs, from storms of rain or snow, or the natural moisture of the land. Wherever courts have had oc-

casion to discuss this question, they have generally declared that the servitude of the lower land cannot be augmented or made more burdensome by the acts or industry of man.

Washburn, referring to the respective rights of adjacent land-owners in respect to waters which fall in rain, or are in any way found upon the surface, but not embraced under the head of streams or watercourses, nor constituting permanent bodies of water, like ponds, lakes, and the like, before reviewing the authorities upon the subject, says: "It may be stated, as a general principle, that, by the civil law, where the situation of two adjoining fields is such that the water falling or collected by melting snows and the like upon one naturally descends upon the other, it must be suffered by the lower one to be discharged upon his land, if desired by the owner of the upper field. But the latter cannot, by artificial trenches or otherwise, cause the natural mode of its being discharged to be changed to the injury of the lower field, as by conducting it by new channels, in unusual quantities, onto particular parts of the lower field": Washburn on Easements, 450.

In *Livingston* v. *McDonald*, 21 Iowa, 160, 89 Am. Dec. 563, the court declared, after reviewing numerous authorities, that the owner of the upper land had no right, even in the course of the use and improvement of his farm, to collect the surface water upon his own lands into a drain or ditch, increased in quantity, or in a manner different from the natural flow, and discharge the same upon the lower lands of another, to the injury of such lands.

In the case under consideration, the facts are different from any of the decided cases. Here both parties are farmers, engaged in the ordinary cultivation of their respective lands by artificial irrigation. To conduct and carry on this business profitably, it is absolutely necessary to bring water from points where it can be obtained, remote and distant from their lands. Without the reasonable use of this water, their lands would be comparatively worthless. The law should not be so construed as to deny or materially abridge the rights of either party to prosecute his agricultural pursuits, or deprive him of any of the incidents necessary to cultivate and improve his lands. We are of the opinion that the upper land-owner, while having the undoubted right to make a reasonable use of the water for irrigation, must so use, manage, and control it as not to injure his neighbor's land. *Sic utere tuo ut alienum non lædas.* He should not be permitted to make his estate more

valuable by an act which renders the estate of the owner of the lower lands less valuable. This general doctrine is derived from the civil law; it is in harmony with the rules established by a majority of the decided cases having any analogy to the case at bar, and it is, in our opinion, founded upon substantial reasons of justice and equity. In the discussion of these principles, the words of Pothier are often quoted with approval: "Each of the neighbors may do upon his heritage what seemeth good to him; in such manner, nevertheless, that he doth not injure the neighboring heritage": *Shane* v. *Kansas City R'y Co.*, 71 Mo. 245; 36 Am. Rep. 480.

In *Livingston* v. *McDonald*, *supra*, the court said: "In examining this subject, and in seeking to settle it upon proper principles, it would be inexcusable to overlook the doctrines of the civil law respecting it. That law, embodying the accumulated wisdom and experience of the refined and cultivated Roman people for over a thousand years, though not binding as authority, is often of great service to the inquirer after the principles of justice and right. . . . . In the determination of this case, we recognize the general rule that each may do with his own as he pleases; but we also recognize the qualification that each should so use his own as not to injure his neighbor."

But it is claimed by appellant that he has acquired the right, by prescription, to have the waste water flow down to and upon the lands of respondent, and that the court erred in giving certain instructions in relation to this right. We are of opinion that the instructions substantially embody correct principles of law that are applicable to the facts of this case; that the objections urged are more technical than substantial; and that it is apparent, even if the instructions were erroneous to some extent, that the jury could not have been misled thereby to the prejudice of appellant. It is useless to discuss the particular phraseology in the instructions to which objection is made, for it is manifest, from the findings of the court and jury, that appellant failed to prove the essential facts necessary to enable him to defeat the action on this ground. The court, at the request of defendant, found the following facts: "That from 1870 to 1879, both years inclusive, defendant irrigated the lands mentioned in the answer herein, and used water thereon, in sufficient quantity to raise valuable crops of grass and hay; that the quantity of water so used by defendant, during this period, varied in quantity each year, but was always sufficient in amount to properly and reasonably irrigate his said lands;

that the waste water arising from such irrigation flowed upon plaintiff's lands; that such flowing was open, notorious, continuous, peaceable, and uninterrupted, and under claim of right, and an infringement of the estate of plaintiff; but that the quantity of water flowing from this irrigation, and the manner of its use, was not the same, but different, during the years, and its was not shown or determined what quantity of surplus or waste water was so permitted or suffered to flow or drain upon plaintiff's land during any time of said period, and the same did not result in any damage to plaintiff's estate."

In the findings requested by the plaintiff, the court says: "That defendant had steadily increased the quantity of water used upon this land, and the surplus thereof, since A. D. 1869; that neither defendant nor his predecessors in interest, at any time for five years, continuously, under claim of right, openly, notoriously, peaceably, and with the acquiescence of the plaintiff [did] flow, or suffer or permit to flow, any certain quantity of surplus or waste water, arising from the irrigation of his lands, upon the lands of plaintiff."

The jury, in answer to the special issues submitted in this case, found that the defendant, in the irrigation of his lands in the years 1880, 1881, and 1882, used "more water than was used in preceding years"; that the surplus water discharged upon plaintiff's land in these years was "greater in quantity than in previous years"; that the plaintiff objected against the discharge of water upon his lands, and remonstrated with defendant "whenever water was discharged on his land to his claimed damage"; that in 1881 and 1882, the waste or surplus water flowing upon plaintiff's land was twice turned off, and the flow thereof ceased, "upon request or demand made by plaintiff." All of these findings are sustained by the evidence.

A mere acquiescence or permission on the part of the respondent to allow the flow of the waste or surplus water in such limited quantity as did his land no injury, cannot be so construed as to give appellant a prescriptive right to increase the flow to such an extent as to damage respondent's land: *Blaisdell* v. *Stephens*, 14 Nev. 23; 33 Am. Rep. 523. Appellant failed to show, to the satisfaction of the court and jury, that he had continuously exercised the right of flowing the waste water upon respondent's land for the period of five years without any substantial change. On the contrary, the evidence shows, as the findings state, that appellant "has steadily increased the quantity of water used upon his land"; and that

the surplus water by him discharged upon the respondent's land in the years A. D. 1880, 1881, and 1882, was greater in quantity than in previous years.

The right acquired by prescription is only commensurate with the right enjoyed. The extent of the enjoyment measures the extent of the right. The right gained by prescription is always confined to the right as exercised for the full period of time required by the statute, which is, in this state, five years. A party claiming a prescriptive right for five years, who, within that time, enlarges the use, cannot, at the end of that time, claim the use as enlarged within that period. To acquire the right, it was incumbent on appellant to prove that he had, for the full period of five years, flowed the water upon respondent's land to such an extent as to occasion damage, and give respondent a right of action. The right by prescription had its origin in a grant, and where a grant is lost, the user is the only evidence of the right supposed to have been granted, and the presumption of a grant can only exist where there has been an open, adverse, continuous, and uninterrupted user to the full extent and nature of the easement claimed.

The acts by which the right is sought to be established must be such as to operate as an invasion of the right claimed to such an extent that during the whole period of use the party whose estate is sought to be charged with the servitude could have maintained an action therefor. The findings in this case also state that, within five years prior to the commencement of this action, the respondent remonstrated with and denied the right of appellant to flow the surplus water over his (respondent's) land to such extent or in such quantity as to damage the same, or the crops growing thereon, and that upon respondent's request, appellant ceased to flow the water. This was sufficient to show that the use to the extent claimed was not acquiesced in by respondent, and to prevent the presumption of a grant authorizing such flow of the water.

There is no assignment of error which authorizes this court to consider any of the objections urged by appellant against the injunction granted by the court. The judgment of the district court is affirmed.

UPPER LAND-OWNER HAS EASEMENT OF DRAINAGE IN LAND OF LOWER PROPRIETOR to the extent of the water naturally flowing from the upper to the lower tract: *Martin* v. *Jett*, 32 Am. Dec. 120, and note; *Lattimore* v. *Davis*, 33 Id. 581; *Overton* v. *Sawyer*, 62 Id. 170; *Kilgore* v. *Grevemberg*, 63

Id. 597; *Delahoussaye* v. *Judice*, 71 Id. 521; *Hooper* v. *Wilkinson*, 77 Id. 194; *Barrow* v. *Landry*, 77 Id. 199; *Butler* v. *Peck*, 88 Id. 452; *Livingston* v. *McDonald*, 89 Id. 563; *Tootle* v. *Clifton*, 10 Am. Rep. 732; *Ogburn* v. *Connor*, 13 Id. 213; *Gibbs* v. *Williams*, 37 Id. 241; *McCormick* v. *Horan*, 37 Id. 479; *Barkley* v. *Wilcox*, 40 Id. 519; *Little Rock etc. R'y* v. *Chapman*, 43 Id. 280; *Ninninger* v. *Norwood*, 47 Id. 412; *Crabtree* v. *Baker*, 51 Id. 424, 425; compare *Pettigrew* v. *Village of Evansville*, 3 Id. 50; *Swett* v. *Cutts*, 9 Id. 276; *Cairo etc. R. R.* v. *Stevens*, 38 Id. 139; *O'Connor* v. *Fond du Lac etc. R'y*, 38 Id. 753; but the servitude in the lower land cannot be augmented or made more burdensome by the acts or industry of the upper land-owner: *Martin* v. *Jett*, 32 Am. Dec. 120, and note; *Lattimore* v. *Davis*, 33 Id. 581; *Kauffman* v. *Griesemer*, 67 Id. 437; *Delahoussaye* v. *Judice*, 71 Id. 521; *Barrow* v. *Landry*, 77 Id. 199; *Miller* v. *Laubach*, 86 Id. 521; *Butler* v. *Peck*, 88 Id. 452; *Livingston* v. *McDonald*, 89 Id. 563; *Adams* v. *Walker*, 91 Id. 742; *McCormick* v. *Kansas City etc. R. R.*, 35 Am. Rep. 431; *Shane* v. *Kansas City etc. R. R.*, 36 Id. 480; *Templeton* v. *Voshloe*, 37 Id. 150; *Crabtree* v. *Baker*, 51 Id. 424; *Boyd* v. *Conklin*, 52 Id. 831; compare *Waffle* v. *New York Central R. R.*, 13 Id. 467; *McCormick* v. *Horan*, 37 Id. 479; *Barkley* v. *Wilcox*, 40 Id. 519; *Hughes* v. *Anderson*, 44 Id. 147; *Phillips* v. *Waterhouse*, 58 Id. 220; *Earl* v. *De Hart*, 72 Am. Dec. 395; *Gannon* v. *Hargadon*, 87 Id. 625.

RIGHT ACQUIRED BY PRESCRIPTION IS MEASURED BY ENJOYMENT: *Roundtree* v. *Brantley*, 73 Am. Dec. 470; *Wright* v. *Moore*, 82 Id. 731; *McCallum* v. *Germantown Water Co.*, 93 Id. 656.

JONES *v.* ADAMS.

[19 NEVADA, 78.]

EVERY MATERIAL FACT NOT FOUND BY COURT BELOW MUST BE PRESUMED in favor of the judgment.

RIPARIAN PROPRIETORS ALL HAVE RIGHT, AT COMMON LAW, TO REASONABLE USE OF WATERS OF STREAM running through their respective lands for the purpose of irrigation; but what is a reasonable use must be determined in each case with reference to the size of the stream, the velocity of the water, the character of the soil, the number of proprietors, the amount of water needed to irrigate, and a variety of other circumstances and conditions surrounding each particular case, the true test in all cases being whether the use is of such a character as to materially affect the equally beneficial use of the waters of the stream by the other proprietors.

RIPARIAN PROPRIETORS HAVE NOT RIGHT, AT COMMON LAW, TO ABSOLUTELY DIVERT ANY PORTION OF WATER away from the stream, nor to any definite quantity for the purpose of irrigation, but each has the right to a reasonable use of the water, determined by the particular facts and circumstances as revealed by the evidence.

COMMON-LAW DOCTRINES, DECLARATORY OF RIGHTS OF RIPARIAN PROPRIETORS RESPECTING USE OF RUNNING WATERS, were held to be inapplicable, or applicable only to a very limited extent, to the wants and necessities of the people in all the Pacific Coast states and territories, prior to the act of Congress of July 26, 1866, and prior appropriation was held to give the better right to the use of the waters to the extent, in quantity and quality, necessary for the uses to which they were applied.

ACT OF CONGRESS OF JULY 26, 1866, CONFIRMED TO OWNERS OF WATER RIGHTS IN PUBLIC LANDS OF UNITED STATES the same rights which they held under the local customs, laws, and decisions of the courts prior to its enactment, and did not introduce, and was not intended to introduce, any new system, or to evince any new or different policy upon the part of the general government, but recognized, sanctioned, protected, and confirmed the system already established by the customs, laws, and decisions of courts, and provided for its continuance.

ACTION concerning certain water rights. The facts are stated in the opinion.

N. Soderberg, for the appellant.

A. C. Ellis, for the respondent.

By Court, HAWLEY, J. A rehearing was granted in this case for the purpose of considering the specifications of error relied upon by appellant. The only question that can be determined under the specification is, "whether the court erred in rendering the judgment it did upon the findings": *Jones* v. *Adams*, 17 Nev. 85. The court declared by its judgment and decree that appellant was entitled to seven tenths of the water of Sierra Creek, and that respondent was entitled to three tenths, and gave to the respective parties the right to divert the amount of water awarded to them out of and away from the stream on their respective lands for the purpose of irrigation, and for their stock and domestic purposes. The evidence upon which the findings were made cannot be reviewed. Every material fact not found must be presumed in favor of the judgment. The third and fifth findings are as follows:—

3. "That the plaintiff, Joseph Jones, is the owner of a usufruct in the waters of said stream, and that he and his grantors first appropriated and used, and that he is the owner, by rights of appropriation and use, of seven-tenths part of all the water customarily flowing in said stream; that the plaintiff, Joseph Jones, is entitled to use, as the first appropriator, upon his said land, upon each and every part thereof, seven tenths of all the water customarily flowing in said Sierra Creek, and is entitled to divert the said water from the said stream upon his said land by means of flumes, ditches, or otherwise, and to use the same upon his said land for the irrigation thereof; and to use so much of the said seven tenths of said stream as is necessary for his stock and domestic purposes."

5. "That the defendant, John Q. Adams, is the owner of a

usufruct in the waters of said stream, and that he and his grantors, in the year 1860, appropriated and used, and that he is the owner, by right of appropriation and use, of three-tenths part of all water customarily flowing in said stream; and that said defendant is entitled to use, as the first appropriator upon his said land and upon each and every part thereof, three tenths of all the water customarily flowing in said Sierra Creek; and is entitled to divert the said water from the said stream upon said land, by means of flumes, ditches, or otherwise, and to use the same upon his said land for the irrigation thereof; and to use so much of the said three-tenths part of said stream as is necessary for his stock and domestic purposes."

These findings support the judgment and decree. But it is argued by appellant that the judgment should have been rendered upon other findings which show that appellant, in 1865, acquired the title in fee to 320 acres of his land, and that said land is situate upon Sierra Creek, and upon both sides thereof; that respondent is the owner in fee of the land described in his answer which is situate upon the same creek, and that he is a riparian proprietor; that upon these facts the case should have been determined by the principles of the common law in relation to the rights of riparian proprietors, instead of upon the principle of prior appropriation; that the doctrine of appropriation and use of the waters of a stream has no application to a case where the parties, or either of them, have procured the title in fee to their lands from the government of the United States prior to the act of Congress of July 26, 1866: R. S. U. S. 2339. It does not appear from the findings when respondent acquired the fee to his land; and if it should be necessary, in order to support the judgment, that it should have been acquired prior to the act of Congress, we are bound, in the absence of any finding to the contrary, to presume it was before that time. If that fact was important, appellant should have asked for a definite finding upon that point: *Warren* v. *Quill*, 8 Nev. 218.

If the theory contended for by appellant, that this case should have been decided upon the principles pertaining to riparian rights should prevail, it would not follow, as claimed by him, that as a lower proprietor he would be entitled to all the water of the stream. This is not the law. We had occasion in *Warren* v. *Quill*, *supra*, to state that the inference must not be drawn "that, in any case, a riparian proprietor may take all

the water of a stream for the purpose of irrigation, to the detriment of adjoining proprietors; for this is not the rule."

In *Vansickle* v. *Haines*, 7 Nev. 249, 286, which is relied upon by appellant, the court use this language: "The common law does not, as seems to be claimed, deprive all of the right to use, but, on the contrary, allows all riparian proprietors to use it in any manner not incompatible with the rights of others. When it is said that a proprietor has the right to have a stream continue through his land, it is not intended to be said that he has the right to all the water, for that would render the stream, which belongs to all the proprietors, of no use to any. What is meant is, that no one can absolutely divert the whole stream, but must use it in such manner as not to injure those below him."

In *Union M. & M. Co.* v. *Ferris*, 2 Saw. 195, where both parties obtained the title in fee to their lands prior to the act of Congress, the question as to the rights of riparian proprietors on a stream was elaborately discussed. The defendant claimed that in a hot and arid climate like Nevada, the use of water for irrigation was a natural want; that the upper proprietor on the stream might consume all the water for the purpose of irrigating his land; and that such use would be reasonable. The court, in considering this question, said: "To lay down the arbitrary rule contended for by the defendant, and say that one proprietor on the stream has so unlimited a right to the use of the water for irrigation, seems to us an unnecessary destruction of the rights of other proprietors on the stream, who have an equal need and an equal right."

But the right to use water for the purpose of irrigation was expressly recognized. "Irrigation must be held in this climate to be a proper mode of using water by a riparian proprietor; the lawful extent of the use depending upon the circumstances of each case. With reference to these circumstances, the use must be reasonable, and the right must be exercised so as to do the least possible injury to others. There must be no unreasonable detention or consumption of the water. That there may be some detention and some diminution, follows necessarily from any use whatever. How long it may be detained, or how much it may be diminished, can never be stated as an arbitrary or abstract rule": *Union M. & M. Co.* v. *Ferris*, 2 Saw. 197.

Under the rules of the common law, the riparian proprietors would all have the right to a reasonable use of the waters

of a stream running through their respective lands for the purpose of irrigation. It is declared in all of the authorities upon this subject that it is impossible to lay down any precise rule which will be applicable to all cases. The question must be determined in each case with reference to the size of the stream, the velocity of the water, the character of the soil, the number of proprietors, the amount of water needed to irrigate the lands per acre, and a variety of other circumstances and conditions surrounding each particular case; the true test in all cases being whether the use is of such a character as to materially affect the equally beneficial use of the waters of the stream by the other proprietors. In *Vansickle* v. *Haines*, *supra*, the court quoted with approval the doctrine announced by Shaw, C. J., in *Elliot* v. *Fitchburg R'y Co.*, 10 Cush. 194, 57 Am. Dec. 85: "That a portion of the water of a stream may be used for the purpose of irrigating land we think is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, wholly obstruct or divert the watercourse, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it, if not diverted or used unreasonably."

Numerous authorities were cited in support of this doctrine: *Vansickle* v. *Haines*, 7 Nev. 287; *Farrell* v. *Richards*, 30 N. J. Eq. 515.

When it is said that such use must be made of the water as not to affect the material rights of other proprietors, it is not meant that there cannot be any diminution or decrease of the flow of water; for if this should be the rule, then no one could have any valuable use of the water for irrigation, which must necessarily, in order to be beneficial, be so used as to absorb more or less of the water diverted for this purpose. The truth is, that under the principles of the common law in relation to riparian rights, if applicable to our circumstances and condition, there must be allowed to all, of that which is common, a reasonable use.

If the judgment had been based upon the findings in relation to riparian rights, it would, therefore, have been at least as favorable to respondent as it now is. The court would not have given either party the right to absolutely divert any portion of the water away from the stream, nor allowed to either

any definite quantity or portion for the purpose of irrigation, but would have given to each a reasonable use of the water, and determined the question of reasonable use by the particular facts and circumstances as revealed by the evidence. Under the rules of the common law, the judgment and decree of the court would, perhaps, have to be modified so as to conform to the views we have expressed: *Union M. & M. Co.* v. *Ferris*, 2 Saw. 199; *Union M. & M. Co.* v. *Dangberg*, 2 Id. 458–460.

But did the court err in rendering its judgment upon the rights of the parties, acquired by appropriation, as set forth in the third and fifth findings? In all of the Pacific coast states and territories, prior to the passage of the act of Congress of July 26, 1866, the doctrines of the common law, declaratory of the rights of riparian proprietors respecting the use of running waters, was held to be inapplicable, or applicable only to a very limited extent, to the wants and necessities of the people, whether engaged in mining, agricultural, or other pursuits; and it was decided that prior appropriation gave the better right to the use of the running waters to the extent, in quantity and quality, necessary for the uses to which the waters were applied. This was the universal custom of the coast, sanctioned by the laws and decisions of the courts in the respective states and territories, and approved and followed by the decisions of the supreme court of the United States. In this condition of affairs, the Congress of the United States, on the 26th of July, 1866, passed the act "granting the right of way to ditch and canal owners over the public lands, and for other purposes," the ninth section of which reads as follows: "That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed; provided, however, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage": 14 U. S. Stats. 253; R. S. U. S. 2339.

In construing this action, the court, in *Vansickle* v. *Haines*, 7

Nev. 280, said: "The act of Congress of July, 1866, if it shows anything, shows that no diversion had previously been authorized; for if it had, whence the necessity of passing that act, which appears simply to have been adopted to protect those who at that time were diverting water from its natural channel? Doubtless all patents issued or titles acquired from the United States since July, 1866, are obtained subject to the rights existing at that time. But this is a different case; for if the appellant has any right to the water, he acquired it by the patent issued to him two years before that time, and with which, therefore, Congress could not interfere. But we do not understand it to be claimed that the act does directly affect this case, but that it is only referred to as exhibiting the policy of the general government. The answer is, that the policy began with that act, was never in any way sanctioned or suggested prior to the time of its passage, and therefore has nothing to do with this case."

In *Union M. & M. Co.* v. *Ferris, supra*, it was claimed by the defendants that the act of Congress confirmed their rights acquired by priority of appropriation; but the court ignored this claim, and indorsed the doctrines enunciated by the court in *Vansickle* v. *Haines, supra*. We are of opinion that the ninth section of the act of Congress confirmed to the owners of water rights on the public lands of the United States the same rights which they held under the local customs, laws, and decisions of the courts prior to its enactment; that the act of Congress did not introduce, and was not intended to introduce, any new system, or to evince any new or different policy upon the part of the general government; that it recognized, sanctioned, protected, and confirmed the system already established by the customs, laws, and decisions of courts, and provided for its continuance.

We had occasion in *Barnes* v. *Sabron*, 10 Nev. 230, to quote with approval the doctrines announced by the supreme court of the United States in *Basey* v. *Gallagher*, 20 Wall. 683, that the government, by its silent acquiescence, had assented to and encouraged the occupation of the public lands for mining purposes; that he who first connected his labor with the property open to general exploration in natural justice acquired a better right to its use and enjoyment than others who had not given such labor; that the miners on the public lands, and throughout the Pacific states and territories, by their customs, usages, and regulations, had recognized the inherent justice

of this principle, and that it had been recognized by legislation, and enforced by the courts, and finally approved by the legislation of Congress in 1866; that this principle was equally applicable to the use of water on the public lands for purposes of irrigation; and we declared that it logically followed, from the legal principles announced in that case, that the first appropriator of the waters of a stream had the right to insist that the water flowing therein should, "during the irrigating season, be subject to his reasonable use and enjoyment to the full extent of his original appropriation and beneficial use."

In *Basey* v. *Gallagher*, 20 Wall. 683, the court, after quoting the ninth section of the act of Congress, said: "It is very evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of public lands under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the state or territory, or the decisions of the courts. The union of the three conditions in any particular case is not essential to the perfection of the right by priority; and in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, must necessarily control."

In *Jennison* v. *Kirk*, 98 U. S. 460, counsel for plaintiff contended that, of the two rights mentioned in the ninth section of the act of Congress, only the right to the use of water on the public lands acquired by priority of possession is dependent upon local customs, laws, and decisions of the courts; and that the right of way over such lands for the construction of ditches and canals is conferred absolutely upon those who have acquired the water right, and is not subject in its enjoyment to the local customs, laws, and decisions. The court refused to sustain this position. It said: "The object of the section was to give the sanction of the United States, the proprietor of lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands. The section is to be read in connection with other provisions of the act of which it is a part, and in the light of matters of public history relating to the mineral lands of the United States."

After stating, at considerable length, the history of the discovery of gold in California, the adoption by the miners — in

their love of order, system, and fair dealing—of rules and regulations for the government of their property rights; the recognition of the rights, by prior appropriation, to the water of a stream conveyed away from its natural channel for mining or other beneficial purposes; the fact that the doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of the miners; that the waters of rivers and lakes were carried great distances in ditches and flumes, constructed with vast labor and enormous expenditure of money, along the sides of mountains, and through cañons and ravines, to supply communities engaged in mining, as well as for agriculturists and for ordinary consumption, and giving the views of the author of the act of Congress, and interpreting its several sections,—the court, speaking of the ninth section, said: "In other words, the United States, by the section, said that whenever rights to the use of water by priority of possession had become vested, and were recognized by the local customs, laws, and decisions of the court, the owners and possessors should be protected in them; and that the right of way for ditches and canals, incident to such water rights, being recognized in the same manner, should be acknowledged and confirmed; but where ditches subsequently constructed injured by their construction the possession of others on the public domain, the owners of such ditches should be liable for the injuries sustained. Any other construction would be inconsistent with the general purpose of the act, which, as already stated, was to give the sanction of the government to possessory rights acquired under the local customs, laws, and decisions of the courts."

In *Broder* v. *Natoma Water Co.*, 101 U. S. 276, the court said: "It is the established doctrine of this court that rights of miners who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations, and for purposes of agricultural irrigation in the region where such artificial use of the water was an absolute necessity, are rights which the government had by its conduct recognized and encouraged, and was bound to protect before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one": *Cof-*

fin v. *Left-hand Ditch Co.*, 6 Col. 443; opinion by Ross, J., in *Lux* v. *Haggin*, 69 Cal. 255.

It necessarily follows from the views we have expressed, and from the doctrines announced in the authorities we have cited, that the court did not err in rendering its judgment and decree upon the findings in relation to prior appropriation. The case of *Vansickle* v. *Haines*, 7 Nev. 280, in so far as the same is in conflict with the views herein expressed, is hereby overruled.

The judgment of the district court is affirmed.

RIPARIAN PROPRIETORS ALL HAVE RIGHT, AT COMMON LAW, TO REASONABLE USE OF WATERS OF STREAM: *Davis* v. *Getchell*, 79 Am. Dec. 636, and note; *Davis* v. *Winslow*, 81 Id. 573; *City of Springfield* v. *Harris*, 81 Id. 715; *Brown* v. *Bowen*, 86 Id. 406; *Ferrea* v. *Knipe*, 87 Id. 128; *Merrifield* v. *Lombard*, 90 Id. 172; *Lobdell* v. *Simpson*, 90 Id. 537; *Pool* v. *Lewis*, 5 Am. Rep. 526; *Dumont* v. *Kellogg*, 18 Id. 102; *Hazeltine* v. *Case*, 32 Id. 715; and this use extends to irrigation: Note to *Davis* v. *Getchell*, 79 Am. Dec. 643; *Rhodes* v. *Whitehead*, 84 Id. 631; *Tolle* v. *Correth*, 98 Id. 540.

REASONABLE USE BY RIPARIAN PROPRIETOR DEPENDS UPON CIRCUMSTANCES, such as the size of the stream, velocity of the water, etc.: *Davis* v. *Getchell*, 79 Am. Dec. 636, and note 641; *Davis* v. *Winslow*, 81 Id. 573; *Hayes* v. *Waldron*, 84 Id. 105; *Pool* v. *Lewis*, 5 Am. Rep. 526; *Hazeltine* v. *Case*, 32 Id. 715, 716; and is a question of fact for the jury: Note to *Davis* v. *Getchell*, 79 Am. Dec. 644; *Hayes* v. *Waldron*, 84 Id. 105; *Pool* v. *Lewis*, 5 Am. Rep. 526.

PRIOR APPROPRIATION OF RUNNING WATERS GIVES BETTER RIGHT THERETO in the Pacific states and territories: *Nevada Water Co.* v. *Powell*, 91 Am. Dec. 685, and note collecting cases; *Lobdell* v. *Simpson*, 90 Id. 537; *Davis* v. *Gale*, 91 Id. 554; *Ophir Silver Mining Co.* v. *Carpenter*, 97 Id. 550.

THOMPSON *v.* RENO SAVINGS BANK.

[19 NEVADA, 103.]

CAPITAL STOCK OF CORPORATION, AND ESPECIALLY UNPAID SUBSCRIPTIONS THERETO, IS TRUST FUND for the benefit of its general creditors.

CERTIFICATE OF INCORPORATION IS MADE FOR BENEFIT OF PUBLIC, and not for the corporation or its stockholders; and those who participated in the incorporation, and, by a certificate made in pursuance of the statute, announced the amount of the capital stock of the corporation, cannot, as against its creditors, contradict the certificate.

SECRET ARRANGEMENT BETWEEN CORPORATION AND ITS STOCKHOLDERS, BY WHICH RESPONSIBILITY OF STOCKHOLDERS IS MADE LESS than it appears to be under the articles of incorporation, is void as against creditors of the corporation.

ONE WHO SIGNS CERTIFICATE OF INCORPORATION AS SUBSCRIBER TO SHARES OF STOCK OF CORPORATION cannot afterwards, as against its creditors, deny such subscription, especially after having participated in its profits in accordance therewith.

STOCKHOLDER, WHO IS CREDITOR OF CORPORATION, CANNOT SET OFF INDEBTEDNESS OF CORPORATION against the amount of his unpaid subscription, in a suit against him by a creditor of the corporation, to subject the unpaid subscription to the satisfaction of the plaintiff's claim.

STOCKHOLDER, WHO IS CREDITOR OF CORPORATION, MUST PAY AMOUNT OF HIS UNPAID SUBSCRIPTION, and surrender his collateral securities upon the failure of the corporation, and he can then participate in the fund ratably with the other creditors.

STOCKHOLDER MAY BE SUED BY CREDITOR OF CORPORATION TO SUBJECT UNPAID SUBSCRIPTION TO SATISFACTION OF HIS JUDGMENT without making the other stockholders parties defendant. If the stockholder so sued be required to pay more than his proportionate share of the debts, his remedy is against the other stockholders owing unpaid subscriptions for contribution.

CREDITOR OF CORPORATION MAY SUE FOR BENEFIT OF HIMSELF, AND OTHER CREDITORS who may choose to come in, establish their claims, and contribute to the expense of the suit, to subject the unpaid subscription of a stockholder to the satisfaction of their claims under the equity practice, and under section 1077 of the Nevada Compiled Laws, which provides that when the question is one of common or general interest of many persons, one or more may sue or defend for the benefit of all.

COMPLAINT FILED BY CREDITOR OF CORPORATION, IN HIS OWN INTEREST, TO REACH UNPAID SUBSCRIPTION OF STOCKHOLDER, MAY BE AMENDED so that the suit shall be for the benefit of himself, and other creditors who may choose to come in, establish their claims, and contribute to the expense of the suit.

CREDITOR OF CORPORATION IS NOT OBLIGED TO GIVE NOTICE TO OTHER CREDITORS, or obtain their consent to the commencement of a suit for the benefit of himself, and other creditors who may choose to come in, establish their claims, and contribute to the expense of the suit, to reach the unpaid subscription of a stockholder.

SUIT in equity by William Thompson, a judgment creditor of the Reno Savings Bank, a corporation, against the bank and M. C. Lake, to subject the amount of Lake's alleged unpaid subscription to the capital stock of the bank to the payment of the plaintiff's judgment. The facts are stated in the opinion.

Robert M. Clarke and Trenmor Coffin, for the appellant.

Stone and Hiles, and R. H. Lindsay, for the respondent.

By Court, BELKNAP, C. J. The Reno Savings Bank is a corporation organized under the laws of this state for banking purposes. It was engaged in the business of banking from its organization, in the month of April, 1876, until the twenty-fourth day of June, 1880, when it became involved, and suspended business. It was then indebted to plaintiff, Thompson, and many others, some of whom, for convenience, assigned their demands to him. Thompson recovered judgment

against the bank. An execution issued upon the judgment was returned *nulla bona*, and thereupon Thompson brought this suit in equity against the bank and Lake, averring, among other things, the recovery of the judgment; that the bank had no assets subject to execution; that Lake was indebted to the bank in the sum of seventeen thousand five hundred dollars upon his unpaid subscription to its capital stock; and prayed that this amount be applied to the payment of the judgment. The suit was brought in the first place by Thompson for himself alone. At the commencement of the trial, the complaint was amended so that all other creditors who would contribute to the expense of the suit could come in as parties and seek relief with the plaintiff. A decree was rendered in favor of plaintiff. From the decree, and an order overruling a motion for a new trial, this appeal is taken.

The certificate of incorporation of the bank fixes its capital stock at one hundred thousand dollars, divided into one hundred shares of the par value of one thousand dollars each. The bank commenced business with the sum of thirty thousand dollars, of which defendant Lake paid seven thousand five hundred dollars. Lake claims that he is not liable because this sum was not paid as a subscription to capital stock, but as a capital upon which the bank was to carry on its business, and avers that it was agreed among those who paid the money that it should be in full of all liability as to them.

The capital stock of a corporation, other than a mining corporation, is the amount of money paid or promised to be paid for the purposes of the corporation. It is a fixed sum, not to be increased or diminished except in the mode permitted by the statute. This sum the law requires shall be stated in the certificate of incorporation to be filed with the county clerk of the county in which the principal place of business of the corporation is situated, and a copy in the office of the secretary of state. The purpose of this requirement is obvious.

The share-holders are not, under the constitution, liable for the debts of the corporation. The capital stock, and especially the unpaid subscriptions thereto, is a trust fund for the benefit of the general creditors. When, therefore, the law requires a public declaration of the amount of the capital upon which a corporation operates, it contemplates a truthful statement in which the general public dealing with the corporation may confide. The certificate is made for the benefit of the public, not for the corporation or its stockholders. Those

who participated in the incorporation of this bank, and, by a certificate made in pursuance of the statute, announced the amount of its capital stock, cannot, as against the creditors of the corporation, contradict their own certificate. Defendant Lake signed it, was president and one of the directors of the bank, participated in the management of its affairs during the period it was engaged in business, and received dividends upon his investment. He cannot now be heard to deny the truth of the certificate which he helped make, and to assert that the capital of the corporation was thirty thousand dollars instead of one hundred thousand dollars. Not only will equity refuse to hear the defense interposed, but the arrangement alleged to have been made is in defiance of the statute under which the bank was incorporated.

Section 3543 of the Compiled Laws provides: "It shall not be lawful for the directors to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock, nor to reduce the amount of the same." Other provisions of the laws upon the subject of corporations permit an increase or diminution of capital stock. Whether the provision concerning a reduction applies to corporations of the character of defendant, it is unnecessary to inquire, since it is not pretended in this case that any reduction was made in compliance with law. The statute requires that any change in the amount of capital stock shall be made at a stockholders' meeting called for that purpose, upon notice specifying the object of the meeting and the proposed changes, which notice shall be published for eight weeks in a newspaper of the county in which the principal place of business of the corporation is located: 2 Comp. Laws, 3401, 3406–3408, 3544.

The publicity required in this proceeding is for the purpose —in part, at least—of advising the public dealing with the corporation of the proposed change. The requirement of the statute—1. That the publicly recorded certificate of incorporation shall state the amount of the capital stock; and 2. That any change in the amount thereof shall only be made after extended public notice—is in direct conflict with the secret contrivance alleged to have been made by Lake and his associates.

The decisions uniformly hold that any secret arrangement between the corporation and its stockholders, by which the responsibility of the latter is made less than it appears to be

under the articles of incorporation, is void as against creditors. Thus in *Allibone* v. *Hager*, 46 Pa. St. 48, the registered certificate of incorporation showed that a given amount of stock remained unpaid. The defendants, who had prepared the certificate, claimed that the unpaid balance represented stock subscribed for by them as agents of the corporation, to be sold by it when in need of funds. The court overruled the defense, in this language: "But, if I comprehend the ground of defense, it seems to me to be directly in conflict with the act, and in contradiction of the certificate. The act requires the stock to be subscribed for, and by persons who are to become members of the company, and the certificate shows that all the original stock was subscribed by and for the defendants in this suit. Whatever might be the law between them and the corporation, as between them and the public the certificate is conclusive. I can not agree, therefore, with the position that creditors have only the rights and equities of the corporation as against the stockholders. They have the rights which the statute gives; no more and no less. The certificate discloses the extent of the capital stock, and the statute renders all the subscribers to it liable for its payment when creditors call. Were undisclosed arrangements permitted to defeat or control the effect of the certificate, that safeguard would at once become a snare, instead of a protection. If capital seeks for immunities, it must take them with such liabilities as are the terms upon which they are granted."

In *McHose* v. *Wheeler*, 45 Pa. St. 40, the certificate was acknowledged and recorded, certifying that one hundred thousand dollars was subscribed as the capital stock of a corporation, and that one quarter of this amount had been paid in. The certificate was untrue. Many of the persons named as subscribers had not subscribed, and no money was paid in. The court held that if a person named in the certificate as a member acted as such, or did not promptly disavow his alleged membership, upon discovering the use of his name, by showing that he was not a member, he would be deemed as ratifying the relation as to creditors; that the defendants, who were incorporators, could not set up their own faults and mistakes in their organization as a defense against creditors; and that, therefore, it was immaterial that no part of the stock had been paid in, although the statute under which the corporation was created required one quarter of the amount to be paid.

Appellant, with others, assumed control of the bank. He

must be held to the consequences of this connection. Persons dealing with the bank were assured that its capital was one hundred thousand dollars. The law contemplates that this representation shall be true. Appellant entered into an arrangement by which he appeared to comply with the articles of incorporation. He must perform the obligation which he appeared to assume. If he did not expressly subscribe for stock, the law implies an agreement upon his part to pay his proportionate share. He received one quarter of the profits of the concern when it was apparently prosperous, and is justly decreed to be a subscriber to its stock to the same extent. Having received the advantages of stockholdership, he cannot escape its responsibilities.

Appellant is a creditor of the bank in a larger sum than the amount of his unpaid subscription, and claims the right to set off his liability with the bank's indebtedness. In *Scammon* v. *Kimball*, 92 U. S. 366, it was held upon similar facts that set-off could not be allowed. In deciding the case, the court said: "Such an indebtedness [for unpaid shares] constitutes an exception to the rule that when there are mutual debts, 'one may be set against the other,' as originally provided by act of Parliament; or, perhaps, it would be more accurate to say that the rule does not apply when it appears that the debts are not in the same right, as well as mutual: *United States* v. *Eckford*, 6 Wall. 488. Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or of a separate debt against a joint debt; nor will such courts allow a set-off of debts accruing in different rights, except under very special circumstances, and when the proofs are clear and the equity is very strong": 2 Story's Eq. Jur., sec. 1437.

The debt which the appellant owes for his unpaid stock is a trust fund which equity will distribute among all of the creditors. The proofs show a deficiency in the fund. Each must, therefore, take his dividend *pro rata*. If the set-off were allowed, the appellant would appropriate the entire fund. "If such a defense were entertained," said the supreme court of Pennsylvania in *Macungie Sav. Bank* v. *Bastian*, 11 Rep. 785, "the effect would be to withdraw from depositors and other creditors of the insolvent bank a portion of the very fund which was specially provided for the common benefit of all alike, and apply it to the sole benefit of the defendant, who at best has no better right thereto than other depositors. If every delinquent subscriber to the capital stock could thus pay his

subscription, what would become of other depositors and creditors of the insolvent bank? It is not difficult to see what a perversion it would be of the trust fund, and to what gross injustice it would necessarily lead."

The bank's indebtedness to appellant is collaterally secured. The district court correctly held that appellant must pay the amount of his unpaid subscription and surrender the collateral securities. He could then participate in the fund ratably with the other creditors.

Objection is made for want of proper parties to maintain this suit. It is urged that the other stockholders should be made parties defendant, to the end that each shall contribute his proportion to the debt, and also that all of the creditors should be united as plaintiffs, so that each may receive his proportion of the fund, and the matter be finally determined in one suit. In a proceeding to wind up and finally settle all of the affairs of the bank, all of the stockholders would be necessary parties defendant. This is not such a proceeding, but one to subject the equitable assets of the bank to the claim of the creditors. If, in this proceeding, the defendant is required to pay more than his proportionate share of the debts of the bank, he may, in an action against the remaining stockholders, require them to contribute their fair share. In *Hatch* v. *Dana*, 101 U. S. 210, this question was considered. The court said: "The liability of a subscriber for the capital stock of a company is several, and not joint. By his subscription, each becomes a several debtor to the company; as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers; and in equity his liability does not cease to be several. A creditor's bill merely subrogates the creditor to the place of the debtor, and garnishes the debt due to the indebted corporation. It does not change the character of the debt attached or garnished. It may be that if the object of the bill is to wind up the affairs of this corporation, all the share-holders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent a multiplicity of suits. But this is no such case. The most that can be said is, that the presence of all the stockholders might be convenient, not that it is necessary. When the only object of a bill is to obtain payment of a judgment against a corporation out of its credits or intangible

property,—that is, out of its unpaid stock,—there is not the same reason for requiring all the stockholders to be made defendants. In such a case, no stockholder can be required to pay more than he owes."

In *Marsh* v. *Burroughs*, 1 Woods, 468, the non-joinder of parties was set up in defense. The court said: "A judgment creditor who has exhausted his legal remedy may pursue in a court of equity any equitable interest, trust, or demand of his debtor, in whosesoever hands it may be, and if the party thus reached has a remedy over against other parties for contribution or indemnity, it will be no defense to the primary suit against him that they are not parties. If a creditor were to be stayed until all such parties could be made to contribute their proportionate shares of the liability, he might never get his money": *Ogilvie* v. *Knox Ins. Co.*, 22 How. 380; *Bartlett* v. *Drew*, 57 N. Y. 587.

The authorities are somewhat conflicting upon the question as to necessary parties plaintiff, in suits of this character. In *Marsh* v. *Burroughs*, *supra*, Mr. Justice Bradley says: "It has long been settled that a judgment creditor who has exhausted his legal remedy by execution returned *nulla bona* may alone, or with other judgment creditors, file a bill against persons holding property of the debtor, which, on account of fraud or the existence of a trust, cannot be reached by execution."

To the same effect is *Bartlett* v. *Drew*, 57 N. Y. 587. This ruling goes further than is necessary to uphold the present case. Other cases hold that all persons interested in the subject-matter of the suit must be made parties, so that complete justice may be done, and a multiplicity of suits avoided. An exception to this rule has been uniformly allowed in cases of the character of the present one, when there are many persons having a common interest. In such cases one or more may sue for the benefit of all, and those who come in and establish their claims share with the plaintiff in the benefit of the decree. The doctrine is thus stated by Chancellor Walworth, in *Hallet* v. *Hallett*, 2 Paige Ch. 19: "If there are many parties standing in the same situation as to their rights or claims upon a particular fund, and when the shares of a part cannot be determined until the rights of all the others are settled or ascertained, as in the case of creditors of an insolvent estate, or residuary legatees, all the parties interested in the fund must, in general, be brought before the court, so that there may be but one account, and one decree set-

tling the rights of all. And if it appears on the face of the complainant's bill that an account of the whole fund must be taken, and that there are other parties interested in the distribution thereof, to whom the defendants would be bound to render a similar account, the latter may object that all who have a common interest with the complainants are not before the court. In these cases, to remedy the practical inconvenience of making a great number of parties to the suit, and compelling those to litigate who might otherwise make no claim upon the defendants, or the fund in their hands, a method has been devised of permitting the complainants to prosecute in behalf of themselves, and all others standing in the same situation who may afterwards elect to come in and claim as parties to the suit, and bear their proportion of the expenses of the litigation."

This rule of equity practice was adopted in this state by section 1077 of the Compiled Laws. The provision enacts, among other things, that "when the question is one of common or general interest, of many persons, ... one or more may sue or defend for the benefit of all": See also *McKenzie* v. *L'Amoureux*, 11 Barb. 516.

The amendment to the complaint heretofore mentioned, by which the other creditors could come in and prosecute the suit with the plaintiff, brought the case within the exception stated. The amendment was made immediately before the trial, but the court, by its decree, allowed the remaining creditors a reasonable time—thirty days from the entry of the decree—within which to prove their claims and share with the plaintiff in the distribution of the trust fund. None came in; but no complaint in this regard has been suggested in behalf of any creditor.

The action of the district court in this particular is consonant with the equity practice. "The court will generally, at the hearing, allow a bill which has originally been filed by one individual of a numerous class in his own right, to be amended so as to make such individual sue on behalf of himself and the rest of the class": 1 Daniel's Chancery Practice, sec. 245. Nor does it appear that notice to the other creditors was necessary. Thompson, in his treatise upon the liability of stockholders, says of suits brought by one creditor in behalf of himself, and all others who may come in and establish their debts: "This does not mean that the creditor who files the bill is under any obligation to look up all the widely scattered creditors of the corporation, and get their consent to the filing of the bill, or

notify them to join him in it": Thompson on Liability of Stockholders, sec. 351.

The decree and order of the district court are affirmed.

During the pendency of this appeal, Mr. Lake, defendant herein, has died. An order has been made directing the substitution of the administrator of his estate.

LIABILITY OF STOCKHOLDERS TO CREDITORS OF CORPORATIONS FOR CORPORATE DEBTS.—The liability of stockholders to the creditors of a corporation for the corporate debts has already been considered in the notes to *Franklin Glass Co.* v. *Alexander*, 9 Am. Dec. 96; *Freeland* v. *McCullough*, 43 Id. 694; *Prince* v. *Lynch*, 99 Id. 432; and *Germantown Passenger R'y Co.* v. *Fitler*, 100 Id. 552. It is now proposed to restate the principles discussed in those notes, and to add a more complete treatment of the subject, warranted by its increasing importance. The liability exists with respect to unpaid subscriptions, and by virtue of statutory provisions.

NO COMMON-LAW LIABILITY TO CREDITORS FOR UNPAID SUBSCRIPTIONS.—While a stockholder is liable in an action at law by the corporation for unpaid subscriptions to its capital stock, which are due and payable by the contract of subscription itself, or which become due by virtue of calls made by the corporation upon its subscribers, in accordance with the terms of the subscription, it does not follow that a creditor of the corporation can maintain such an action. Courts of law, at least in this respect, regard the corporation as an entity or person distinct from its stockholders. A debt due from the corporation is not a debt due from the stockholders. The contract of subscription is made with the corporation, and it, or its successors, only, can enforce the contract at law. There is no privity between the creditors of the corporation and its stockholders, and therefore no legal action can be maintained by the creditors to recover unpaid subscriptions: See 2 Morawetz on Corporations, sec. 818; *Cooper* v. *Frederick*, 9 Ala. 739, 742; *Jones* v. *Jarman*, 34 Ark. 323, 328; *Spear* v. *Grant*, 16 Mass. 9, 15; *Brown* v. *Fisk*, 23 Fed. Rep. 228; *Patterson* v. *Lynde*, 106 U. S. 519; 112 Ill. 196, 204, 207.

UNPAID SUBSCRIPTIONS, WHEN DUE AND PAYABLE, ARE SUBJECT TO GARNISHMENT BY CREDITORS. The right of a creditor to reach unpaid subscriptions by garnishment proceedings depends upon the question whether or not there is such an indebtedness on the part of the stockholder as would authorize the corporation itself to maintain an action against him for the unpaid subscriptions. This question is governed by the contract of the stockholder with the corporation. A subscriber to the capital stock may agree to pay at once, or in installments falling due at certain times, or, as is usually the case, upon call of the corporation. Plainly, a corporation cannot maintain an action against a subscriber or his successors for unpaid subscriptions, unless they are due and payable by the terms of the subscription itself, or unless a call has been made and the subscriber has become delinquent. Until a subscriber is thus in default, the corporation cannot maintain an action against him, because there is no indebtedness, and as there is no indebtedness, garnishment proceedings by a creditor cannot be maintained: *Bingham* v. *Rushing*, 5 Ala. 403; *Cooper* v. *Frederick*, 9 Id. 739, 742; *Paschall* v. *Whitsett*, 11 Id. 472, 477; *Brown* v. *Union Ins. Co.*, 3 La. Ann. 177, 182; *Hannah* v. *Moberly Bank*, 67 Mo. 678; *Simpson* v. *Reynolds*, 71 Id. 594; *McKelvey* v. *Crockett*, 18 Nev. 238; *Lane's Appeal*, 165 Pa. St. 49; 51 Am. Rep. 166; note to *Freeland* v. *McCullough*, 43 Am. Dec. 702.

But, on the other hand, it follows that if subscriptions are due and payable, they are, to that extent, like other debts due the corporation, subject to garnishment: Cook on Stock and Stockholders, sec. 201; *Faull* v. *Alaska G. & S. Min. Co.*, 8 Saw. 420; 14 Fed. Rep. 657; *De Mony* v. *Johnston*, 7 Ala. 51; *Meints* v. *East St. Louis etc. Co.*, 89 Ill. 48; *Brown* v. *Union Ins. Co.*, 3 La. Ann. 177, 182; *Payne* v. *Bullard*, 23 Miss. 88; 55 Am. Dec. 74; *Hannah* v. *Moberly Bank*, 67 Mo. 678; *Peterson* v. *Sinclair*, 83 Pa. St. 250; note to *Freeland* v. *McCullough*, 43 Am. Dec. 702; 2 Morawetz on Corporations, sec. 819. It is possible, however, that a garnishment law or some other statute may be so framed as to permit a creditor of a corporation to garnish unpaid subscriptions which are not due. Thus, under section 8 of the general incorporation act of Illinois, it is held that stockholders may be compelled to pay to a garnishing creditor any balance unpaid upon stock owned by them respectively, whether such stock has been called in or not: *Robertson* v. *Noeninger*, 20 Ill. App. 227; and in this case of *In re Glen Iron Works*, 20 Fed. Rep. 674, affirming 17 Id. 324, 16 Phila. 563, it was held that in Pennsylvania the efficacy of attachment process was not confined to the garnishment of legal demands, but extended to those of an equitable nature, and that the unpaid subscriptions to the capital stock of an insolvent corporation could be reached by writ of attachment execution, although no assessment or call had been made; but this case was expressly and pointedly disapproved in *Lane's Appeal* (otherwise cited as *Bunn's Appeal*), 105 Pa. St. 49; 51 Am. Rep. 166. It has been held that, where stockholders are in default after calls regularly made, a judgment creditor of the corporation has a complete remedy at law, and therefore will not, in the absence of some special circumstance, be allowed to proceed in equity: *Allen* v. *Montgomery R. R.*, 11 Ala. 437; but the case of *Payne* v. *Bullard*, 23 Miss. 88, 55 Am. Dec. 74, holds, perhaps in contravention of the rule hereafter noted that the legal remedies must first be exhausted, that equity has jurisdiction of a suit by a judgment creditor to compel a stockholder to pay the arrears of his subscription, although, installments of the subscription falling due periodically, there is a remedy at law by process of garnishment; although it is well to remember the principle that the jurisdiction of equity is not taken away by statute providing an adequate remedy at law, in the absence of express language, or by necessary implication: See 1 Pomeroy's Eq. Jur., secs. 279–281; *Harmon* v. *Page*, 62 Cal. 448; *Holmes* v. *Sherwood*, 3 McCrary, 405; 16 Fed. Rep. 725.

A limitation upon the right of a creditor of a corporation to resort to garnishment proceedings has been placed by *Lane's Appeal*, 105 Pa. St. 49, 51 Am. Rep. 166, in which it is asserted that if the corporation is solvent, and the subscription is in the form of an absolute engagement to pay the price of the stock, there was no doubt that the creditor could reach the amounts unpaid by attachment in execution, but that it seems this could not be done if the corporation was insolvent, because upon insolvency the unpaid amounts constituted a trust fund for the benefit of all the creditors.

MANDAMUS BY CORPORATE CREDITORS TO COMPEL OFFICERS OF CORPORATION TO MAKE CALL. — *Mandamus* by creditors of corporations to compel the officers to make calls for the purpose of raising funds to meet their demands is a remedy to which a resort does not appear to have been attempted in this country; and the use of the writ for this purpose has been doubted: Cook on Stock and Stockholders, sec. 202; *Hays* v. *Lycoming F. Ins. Co.*, 98 Pa. St. 184; but in England, a *mandamus* is sometimes awarded: Cook on Stock and Stockholders, sec. 202; *The Queen* v. *Victoria Park Co.*, 1 Q. B. 288; *The Queen* v. *Ledgard*, 1 Id. 616; *The King* v. *St. Katharine Dock Co.*, 4

Barn. & Adol. 360; and see *Hatch* v. *Dana*, 101 U. S. 205, 215; *Thompson* v. *Reno Savings Bank*, 19 Nev. 242, 245, *post*, p. 883. It has, however, been decided that creditors need not apply for a *mandamus*, but may compel the payment of unpaid subscriptions by suit in equity: *Ward* v. *Griswoldville Mfg. Co.*, 16 Conn. 593, 601; *Dalton etc. R. R. Co.* v. *McDaniel*, 56 Ga. 191. And in *Patterson* v. *Lynde*, 112 Ill. 196, 206, the court was of the opinion that a foreign insolvent corporation, if still in existence, could be compelled by *mandamus*, or by bill in equity, to collect the unpaid subscriptions from its stockholders. If it had ceased to exist, a receiver should be appointed, who would represent the corporation.

UNPAID SUBSCRIPTIONS CONSTITUTE, IN EQUITY, TRUST FUND FOR BENEFIT OF CREDITORS. — It is a well-settled doctrine of the American courts that the capital stock of a corporation, including, especially, unpaid subscriptions, constitutes, in equity, a trust fund for the benefit of its creditors: Note to *Freeland* v. *McCullough*, 43 Am. Dec. 695; *Germantown Passenger R'y* v. *Fitler*, 100 Id. 546, and note 552; Cook on Stock and Stockholders, sec. 199; Thompson's Liability of Stockholders, secs. 10, 11; Angell and Ames on Corporations, secs. 600 et seq.; Boone on Corporations, sec. 112; 2 Morawetz on Corporations, sec. 820; Taylor on Corporations, secs. 654 et seq.; 2 Waterman on Corporations, sec. 208; 2 Story's Eq. Jur., sec. 1252; *Wood* v. *Dummer*, 3 Mason, 308, 311; *Winans* v. *McKean R. R. etc. Co.*, 6 Blatchf. 215, 222; *Union Nat. Bank* v. *Douglass*, 1 McCrary, 86; *Holmes* v. *Sherwood*, 3 Id. 405, 408; 16 Fed. Rep. 725, 727; *Marsh* v. *Burroughs*, 1 Woods, 463, 468; *Curran* v. *State of Arkansas*, 15 How. 304; *Railroad Co.* v. *Howard*, 7 Wall. 392, 409; *Sawyer* v. *Hoag*, 17 Id. 610; *Upton* v. *Tribilcock*, 91 U. S. 45; *Sanger* v. *Upton*, 91 Id. 56, 60; *Webster* v. *Upton*, 91 Id. 65, 66, 71; *Scammon* v. *Kimball*, 92 Id. 362, 367; *Hatch* v. *Dana*, 101 U. S. 205, 210; *County of Morgan* v. *Allen*, 103 Id. 498; *Allen* v. *Montgomery R. R.*, 11 Ala. 437; *Goodwin* v. *McGehee*, 15 Id. 232, 246; *Smith* v. *Huckabee*, 53 Id. 191, 195; *Glenn* v. *Semple*, 80 Id. 159; 60 Am. Rep. 92–94; *Jones* v. *Arkansas Mechanical etc. Co.*, 38 Ark. 17; *Ward* v. *Griswoldville Mfg. Co.*, 16 Conn. 593, 599; *Crandall* v. *Lincoln*, 52 Id. 73; 52 Am. Rep. 560, 562; *Hightower* v. *Thornton*, 8 Ga. 486; 52 Am. Dec. 412; *Reid* v. *Eatonton Mfg. Co.*, 40 Ga. 98, 102; 2 Am. Rep. 563, 565; *Clapp* v. *Peterson*, 104 Ill. 26, 31; *Coffin* v. *Ransdell*, 110 Ind. 417, 421; *Osgood* v. *King*, 42 Iowa, 478; *Robertson* v. *Conrey*, 5 La. Ann. 297; *Rider* v. *Morrison*, 54 Md. 429, 444; *Farnsworth* v. *Robbins*, 36 Minn. 369; *Payne* v. *Bullard*, 23 Miss. 88; 55 Am. Dec. 74; *Haskell* v. *Sells*, 14 Mo. App. 91; *National Trust Co.* v. *Miller*, 33 N. J. Eq. 155; *Wetherbee* v. *Baker*, 35 Id. 501; *Mann* v. *Pentz*, 3 N. Y. 415, 422; *Dayton* v. *Borst*, 31 Id. 435, 436; *Bartlett* v. *Drew*, 57 Id. 587, 589; *Hastings* v. *Drew*, 76 Id. 9; *Gilmore's Ex'rs* v. *Bank of Cincinnati*, 8 Ohio, 62, 71; *Bank of Virginia* v. *Adams*, 1 Pars. Sel. Cas. 534; *Lane's Appeal*, 105 Pa. St. 49; 51 Am. Rep. 166; *Macungie Savings Bank* v. *Bastian*, 11 Rep. 785; *Ohio Life Ins. & T. Co.* v. *Merchants' Ins. & T. Co.*, 11 Humph. 1; 53 Am. Dec. 742; *Adler* v. *Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57, 60.

This doctrine is at the foundation of the principal rules on the subject of the right of creditors of corporations, to compel the payment of unpaid subscriptions by stockholders in America. The overlooking of it, or the failure to recognize its importance by some courts, has caused no little confusion. As a result of the doctrine, a creditor of a corporation can maintain a suit against the personal representatives of a deceased stockholder to compel the payment of his unpaid subscription, without presenting any demand to the representatives for allowance, as is required in ordinary cases by the Nevada Com-

piled Laws: *Thompson* v. *Reno Savings Bank*, 19 Nev. 242; *post*, p. 883; compare *Davidson* v. *Rankin*, 34 Cal. 503, in which the liability of a stockholder for the debts of the corporation arose under a statute.

This doctrine seems to be a distinctively American one, and serves to explain some of the differences between the English and American cases. It was first announced by Mr. Justice Story, in 1824, in *Wood* v. *Dummer*, 3 Mason, 308, 311, who, in speaking of the capital stock of banking corporations, said: "The capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank. The public, as well as the legislature, have always supposed this to be a fund appropriated for such purpose. The individual stockholders are not liable for the debts of the bank in their private capacities. The charter relieves them from personal responsibility, and substitutes the capital stock in its stead. Credit is universally given to this fund by the public as the only means of repayment. During the existence of the corporation, it is the sole property of the corporation, and can be applied only according to its charter, that is, as a fund for payment of its debts, upon the security of which it may discount and circulate notes. Why, otherwise, is any capital stock required by our charters? If the stock may, the next day after it is paid in, be withdrawn by the stockholders without payment of the debts of the corporation, why is its amount so studiously provided for, and its payment by the stockholders so diligently required? To me, this point appears so plain, upon principles of law, as well as common sense, that I cannot be brought into any doubt that the charters of our banks make the capital stock a trust fund for the payment of all the debts of the corporation. The bill-holders and other creditors have the first claims upon it, and the stockholders have no rights until all the other creditors are satisfied." Again, in *Sanger* v. *Upton*, 91 U. S. 56, 60, Swayne, J., says: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation."

And in the oft cited and quoted case of *Adler* v. *Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57, 60, Chief Justice Dixon remarks: "The stockholders being in general free from personal responsibility, the capital stock constitutes the sole fund to which creditors look for the liquidation of their demands. It is the basis of the credit which is extended to the corporation by the public, and a substitute for the individual liability which exists in other cases. So far as creditors are concerned, it is regarded in the law as a trust fund pledged for the payment of the debts of the corporation. Until they are paid, the stockholders are postponed; they are only entitled to that which remains after the claims of the creditors are extinguished. This is as true

of the unpaid shares subscribed, or balances due thereon, as of the amount which has actually been paid in. Such unpaid shares or balances are as much a part of the capital stock as the sums which have already been realized thereon. Aside from the funds on hand, they often constitute the only resource of the company. They are debts due to it, the payment of which can be enforced by its officers. The delinquent subscribers are its debtors, and the directors are clothed with authority to compel them to pay. When the company is indebted, and other means of meeting its liabilities are exhausted, the exercise of this authority becomes a duty, which they are under the highest moral obligation to perform. Creditors are supposed to have trusted as well to such unpaid subscriptions, and to the fair and faithful exercise of such compulsory power for their payment, as to the sums actually paid in; and when it becomes necessary to their security or satisfaction, they have a legal right, either by the voluntary action of the proper officers, or through the aid of the courts of the country, to such exercise of it. If, therefore, by the willful or stubborn inaction of the directors or stockholders, the company fails to meet its obligations and perform its duties, a court of equity will, on a proper application, afford the requisite relief." But, "in speaking of the assets of an insolvent corporation as constituting a trust fund for the payment of creditors," says Robinson, J., in *Brant* v. *Ehlen*, 59 Md. 124, "it is necessary to understand precisely what is meant by the courts. No one will pretend for a moment that in subscribing to the stock of a company, the purpose is to create a trust fund for creditors. On the contrary, the object, primarily, is to furnish means to carry on its business, and to share the profits earned by the corporation; and so long as it is a going concern, it has the right, and indeed it is its duty, to manage and dispose of its assets, including stock subscriptions, for the promotion of its own interest. If it ceases to do business, or if it becomes insolvent, then all assets which it then has or owns, including paid and unpaid subscriptions, either in the hands of the original subscriber or in the hands of his assignee with notice, become a trust fund for the payment of creditors, and they have the right to follow the property constituting this fund and subject it to the payment of their debts, unless it has passed into the hands of a *bona fide* purchaser without notice."

EQUITABLE JURISDICTION TO COMPEL PAYMENT OF UNPAID SUBSCRIPTIONS, OR TO MAKE CALLS. — Since unpaid subscriptions to the capital stock are regarded in equity as a trust fund for the benefit of the creditors of a corporation, it results that courts of equity have jurisdiction and will compel the payment of the subscriptions by stockholders, as equitable assets, at the suit of creditors of the corporation, if the legal assets which can be reached by execution prove insufficient: Note to *Freeland* v. *McCullough*, 43 Am. Dec. 695; note to *Germantown Passenger R'y* v. *Fitler*, 100 Id. 553; Cook on Stock and Stockholders, sec. 204; Thompson's Liability of Stockholders, secs. 9 et seq.; 2 Morawetz on Corporations, sec. 820; Taylor on Corporations, sec. 703; *Ogilvie* v. *Knox Ins. Co.*, 22 How. 380; *Holmes* v. *Sherwood*, 3 McCrary, 405, 408; 16 Fed. Rep. 725, 727; *Bissit* v. *Kentucky River Nav. Co.*, 15 Fed. Rep. 353; *Wilbur* v. *Stockholders of Glen Iron Works*, 18 Nat. Bank. Reg. 178; 13 Phila. 479 (U. S. D. C., E. D. of Pa.); *Allen* v. *Montgomery R. R.*, 11 Ala. 437; *Glenn* v. *Semple*, 80 Id. 159; 60 Am. Rep. 92-94; *Jones* v. *Jarman*, 34 Ark. 323, 328; *Harmon* v. *Page*, 62 Cal. 448; *Hightower* v. *Thornton*, 8 Ga. 486; 52 Am. Dec. 412; *Stinson* v. *Williams*, 35 Ga. 170; *Mann* v. *Pentz*, 3 N. Y. 415; *Gillet* v. *Moody*, 5 Barb. 179; 3 N. Y. 479; *Gilmore's Ex'rs* v. *Bank of Cincinnati*, 8 Ohio, 62, 71; *Henry* v. *Vermillion etc. R. R.*, 17 Id.

187; *Bank of Virginia* v. *Adams*, 1 Para. Sel. Cas. 534; *Lane's Appeal*, 105 Pa. St. 49; 51 Am. Rep. 166; *Bassett* v. *St. Albans Hotel Co.*, 47 Vt. 313. And as shown above, even if creditors of the corporation can compel its officers by *mandamus* to make calls to meet the company's liabilities, they are not obliged to do so, but may resort to equity: *Ward* v. *Griswoldville Mfg. Co.*, 16 Conn. 593, 601; *Dalton etc. R. R. Co.* v. *McDaniel*, 56 Ga. 191; and as further shown, no action at law, independent of statute, can be maintained by creditors against stockholders, but proceedings must be had in equity: *Cooper* v. *Frederick*, 9 Ala. 739, 742; *Jones* v. *Jarman*, 34 Ark. 323, 328; *Spear* v. *Grant*, 16 Mass. 9, 15; *Brown* v. *Fisk*, 23 Fed. Rep. 228. This equitable suit, furthermore, is not affected by any remedy which may be given creditors against stockholders by constitutions, charters, general acts of incorporation, or other statutes, unless of course the equitable remedy be taken away expressly or by necessary implication: See *Harmon* v. *Page*, 62 Cal. 448; *Holmes* v. *Sherwood*, 3 McCrary, 405; 16 Fed. Rep. 725; and it is held that although installments of the subscription are due, and may be reached by process of garnishment, the equitable jurisdiction nevertheless exists: *Payne* v. *Bullard*, 23 Miss. 88; 55 Am. Dec. 74; *contra: Allen* v. *Montgomery R. R.*, 11 Ala. 437. So where a state constitution provides that the stockholders of corporations "shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more," no new right is created, and the remedy of a creditor against a stockholder for unpaid subscriptions is still in equity: *Patterson* v. *Lynde*, 106 U. S. 519; 112 Ill. 196, 204, 207; *Bush* v. *Cartwright*, 7 Or. 329; *Brundage* v. *Monumental G. & S. Min. Co.*, 12 Id. 322; compare *Hodges* v. *Silver Hill Min. Co.*, 9 Id. 200, 204; *Mills* v. *Stewart*, 41 N. Y. 384, 389; *Stephens* v. *Fox*, 83 Id. 313.

While it is essential to the recovery by the corporation itself against the stockholders upon their contracts of subscription that the money should be due and payable, either because the contracts themselves have definitely fixed the times of payment, or because calls have been made by the governing body of the corporation, no such condition is imposed upon the creditors with regard to their right to proceed in equity against the stockholders. No previous call need be shown by the creditors, nor need they show that they have endeavored to induce the corporation to make a call as a prerequisite to a suit in equity to compel stockholders to pay their unpaid subscriptions: 2 Morawetz on Corporations, sec. 821; note to *Germantown Passenger R'y* v. *Fitler*, 100 Am. Dec. 554; *Marsh* v. *Burroughs*, 1 Woods, 463, 468; *Holmes* v. *Sherwood*, 3 McCrary, 405; 16 Fed. Rep. 725; *Thompson* v. *Reno Sav. Bank*, 19 Nev. 171; *post*, p. 881; *Thompson* v. *Reno Sav. Bank*, 19 Nev. 242; *post*, p. 883; although the subscriptions are payable "as called for by the company": *Hatch* v. *Dana*, 101 U. S. 205; see also *Upton* v. *Hansbrough*, 3 Biss. 417.

Besides the usual proceeding in equity above described, in the nature of a creditor's bill, to compel the payment of unpaid subscriptions by stockholders, it is also settled that when stock is payable upon call, and the corporation refuses or neglects to make a call, a court of equity may itself make it, if the interests of the creditors require it: Cook on Stock and Stockholders, sec. 207; Thompson's Liability of Stockholders, sec. 16; note to *Germantown Passenger R'y* v. *Fitler*, 100 Am. Dec. 553; *Dr. Salmon* v. *The Hamborough Co.*, 1 Cas. Ch. 204; *Scovill* v. *Thayer*, 105 U. S. 143, 155; *Glenn* v. *Williams*, 60 Md. 93; *Briggs* v. *Penniman*, 8 Cow. 387, 395; 18 Am. Dec. 454, 460; and the decree determining and making such an assessment is binding and effective upon the stockholders who were not, in their individual

capacities, parties to the suit, they being represented by the corporation: *Glenn* v. *Williams*, *supra*. It is obviously necessary, however, for such a purpose, that a sufficient corporate organization should continue to exist: *Wilbur* v. *Stockholders of Glen Iron Works*, 18 Nat. Bank. Reg. 178; 13 Phila. 479 (U. S. D. C., E. D. of Pa.). The "assessment," or "call," so named, is also different in its nature from the assessment or call made by a solvent corporation. The proceeding is simply in aid of the judicial recourse of the creditors. "It may promote the enforcement, but is not essential to the existence of the obligation of the stockholders": *Wilbur* v. *Stockholders of Glen Iron Works*, *supra*.

In the suit first above noted, to compel the payment of unpaid subscriptions, the right of creditors is as clear and strong after as before the dissolution of the corporation: *Hightower* v. *Thornton*, 8 Ga. 486; 52 Am. Dec. 412; *Tarbell* v. *Page*, 24 Ill. 46; although at common law, at least under the old theory, the debts due to and from the corporation are extinguished upon its dissolution: See *Hightower* v. *Thornton*, *supra*; *Thornton* v. *Lane*, 11 Ga. 459; compare Thompson's Liability of Stockholders, sec. 3. Herein this case differs from that above mentioned, where it is sought to have a call made by a court of equity, in which, it seems, the corporation must be in existence: See *Wilbur* v. *Stockholders of Glen Iron Works*, *supra*. And notwithstanding the common-law rule as to the extinguishment of debts upon the dissolution of a corporation, it is competent, it may be here observed, for the legislature to interpose and prevent such a result: *Robinson* v. *Lane*, 19 Ga. 337; and see *Lane* v. *Morris*, 8 Id. 468, 476; *Thornton* v. *Lane*, 11 Id. 459; Thompson's Liability of Stockholders, sec. 3. Of course the insolvency of a corporation is no ground for restraining the collection of subscriptions by itself to its stock: Note to *Germantown Passenger R'y* v. *Fitler*, 100 Am. Dec. 552; *Dill* v. *Wabash Valley R. R.*, 21 Ill. 91; *Protection Ins. Co.* v. *Ward*, 28 Conn. 409. "Indeed, it shows the more urgent reason why they should be collected": *Dill* v. *Wabash Valley R. R.*, 21 Ill. 91.

If it be necessary, creditors may compel discovery of the names of stockholders and the amounts unpaid on their subscriptions: *Morgan* v. *New York etc. R. R.*, 10 Paige, 290; 40 Am. Dec. 244; *Miers* v. *Zanesville etc. Turnpike Co.*, 11 Ohio, 273; and see *President etc. of Middletown Bank* v. *Russ*, 3 Conn. 135; *Bogardus* v. *Rosendale Mfg. Co.*, 7 N. Y. 147. A creditor can compel payment of the entire stock, if required to satisfy his demands: *Haldermas* v. *Ainslee*, 82 Ky. 395. So, to the extent of their own unpaid subscriptions, stockholders may be liable to make good the deficiency of assets of the corporation arising from the insolvency of other stockholders: *Haslett's Ex'rs* v. *Wotherspoon*, 1 Strob. Eq. 209. And the fact that holders of unpaid stock of a banking corporation have severally redeemed their shares of bank bills, under the charter which provided that the persons and property of the stockholders should be liable for the redemption of the bills and notes of the bank, in proportion to the number of shares of stock which they held, will not release them from liability for the amounts due on their stock subscriptions: *Marsh* v. *Burroughs*, 1 Woods, 403; and it may here be further observed that generally where statutes impose an individual liability upon stockholders for the debts of a corporation, that such liability is over and above the liability for unpaid subscription: See *Patterson* v. *Wyomissing Mfg. Co.*, 40 Pa. St. 117. If the complainant is also a stockholder, he must contribute *pari passu* with the defendant stockholders towards the liquidation of his demand against the corporation: *Bisset* v. *Kentucky River Nav. Co.*, 15 Fed. Rep. 353.

It is possible that share-holders may be liable to creditors of a corporation

for unpaid subscriptions, notwithstanding a violation of the charter with respect to the subscriptions, as the following cases will illustrate. There is no liability on subscriptions to the capital stock of a corporation until the whole of the capital, as prescribed by the charter, has been subscribed; and therefore a creditor's bill will not lie to enforce payment of such subscriptions, unless for some cause the subscribers have estopped themselves from alleging that the entire capital was not subscribed: 2 Morawetz on Corporations, sec. 823; *Temple* v. *Lemon*, 112 Ill. 51; but if a corporation should, in violation of its charter, begin to carry on business, and incur debts before its entire capital stock had been subscribed, undoubtedly the share-holders would be liable to the extent of their subscriptions, if necessary to pay creditors: 2 Morawetz on Corporations, sec. 823; *Morrison* v. *Dorsey*, 48 Md. 468; *Musgrave* v. *Morrison*, 54 Id. 161; *Hager* v. *Cleveland*, 36 Id. 476; compare *Boston etc. R. R. Co.* v. *Pearson*, 128 Mass. 445. So a creditor's bill will lie against stockholders to compel the payment of unpaid subscriptions, although they failed to pay at the time of their subscriptions the per cent required by the charter: *Henry* v. *Vermillion etc. R. R. Co.*, 17 Ohio, 187. And "if the charter of a bank require a certain portion of the capital stock in specie to be paid in before the directors are permitted to issue bank notes, and the stock is subscribed, but the specie is not paid, and the directors nevertheless proceed to issue and put in circulation the bank notes, if the bank fail or become insolvent, the bill-holders and creditors may proceed at once against the stockholders for the subscribed stock not paid in, and against the directors for a breach of trust for issuing and putting in circulation notes on unpaid subscribed stock, contrary to their duty under the charter": *Schley* v. *Dixon*, 24 Ga. 273, 277.

If a state has become a stockholder in a corporation, a creditor's right to compel it to pay its unpaid subscription will depend upon the question whether or not suit can be maintained against it under its constitution and statutes; for a sovereign state cannot be sued without its consent, and then only in the particular mode and forum nominated by itself: Thompson's Liability of Stockholders, sec. 20. If, therefore, a state has subscribed to the stock of a corporation, and has not made payment, an action to compel payment will not lie against it without its consent: *Miers* v. *Zanesville etc. Turnpike Co.*, 11 Ohio, 273; but if a state has rendered itself liable to a private action, and has become a stockholder in a corporation, it subjects itself to the same liabilities which attach to any private stockholders: *Curran* v. *State of Arkansas*, 15 How. 304; compare *Robinson* v. *Bank of Darien*, 18 Ga. 65, 109; *Dabney* v. *Bank of South Carolina*, 3 S. C. 124; and a city having subscribed to the stock of a railroad company, under an act authorizing cities to aid in the construction of railroads, is bound by the same statutory liability which attaches to an ordinary stockholder for labor done in the construction of the road: *Shipley* v. *City of Terre Haute*, 74 Ind. 297.

It has been held that a court of equity had no jurisdiction to compel resident stockholders to pay their unpaid subscriptions on the application of creditors of a foreign corporation: *Bank of Virginia* v. *Adams*, 1 Pars. Sel. Cas. 534, — a technical decision; and it is otherwise held that the judgment which it is necessary for the creditor to first obtain against the corporation must be a judgment of the courts of the state where the liability is sought to be enforced: *Patterson* v. *Lynde*, 112 Ill. 196, 204.

In *Warner* v. *Callender*, 20 Ohio St. 190, it was held that a judgment creditor could unite, in the same action, a claim to compel payment of unpaid

subscriptions for stock and a claim to enforce the statutory liability of the stockholders for the debts of the corporation.

CREDITOR MUST EXHAUST LEGAL REMEDIES AGAINST CORPORATION BEFORE PROCEEDING IN EQUITY AGAINST STOCKHOLDERS FOR UNPAID SUBSCRIPTIONS. As has already been intimated, before a creditor can resort to equity to compel the payment of unpaid subscriptions, it is necessary, under ordinary circumstances, that he should have exhausted his legal remedies against the corporation by judgment and execution thereon returned unsatisfied: Note to *Germantown Passenger R'y Co.* v. *Fitler*, 100 Am. Dec. 554; Cook on Stock and Stockholders, sec. 200; 2 Morawetz on Corporations, sec. 820; Taylor on Corporations, sec. 703; *Terry* v. *Anderson*, 95 U. S. 628, 636; *Patterson* v. *Lynde*, 112 Ill. 196, 204; *Wetherbee* v. *Baker*, 35 N. J. Eq. 501, 506; *Blake* v. *Hinkle*, 10 Yerg. 218; *Adler* v. *Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57, 62; see also *Ogilvie* v. *Knox Ins. Co.*, 22 How. 380; *Holmes* v. *Sherwood*, 3 McCrary, 405, 408; 16 Fed. Rep. 725, 727; *Allen* v. *Montgomery R. R. Co.*, 11 Ala. 437; *Harmon* v. *Page*, 62 Cal. 448; *Stinson* v. *Williams*, 35 Ga. 170; *Mann* v. *Pentz*, 3 N. Y. 415; *Lane's Appeal*, 105 Pa. St. 49; 51 Am. Rep. 166. These are the ordinary prerequisites to the filing of a creditor's bill: See 2 Freeman on Executions, sec. 428; 3 Pomeroy's Eq. Jur., sec. 1415, and notes. But within the general principles of creditors' suits, special circumstances, as the bankruptcy of the corporation, its notorious insolvency, or its formal dissolution, may excuse creditors from first taking these steps: See Cook on Stock and Stockholders, sec. 200; *Terry* v. *Anderson*, 95 U. S. 628, 636, per Waite, C. J.; but it is not a sufficient showing that no judgment at law could be obtained to allege that the stockholders have failed and refused to elect directors and officers, an act of the legislature expressly authorizing process to be served on the late president, cashier, or any director of the corporation: *Blake* v. *Hinkle*, 10 Yerg. 218.

It has been held that the judgment must be a judgment of the state in which the creditor's bill is filed: *Patterson* v. *Lynde*, 112 Ill. 196, 204; *Bank of Virginia* v. *Adams*, 1 Para. Sel. Cas. 534, — a ruling which might be the means of denying the creditor relief; but if a receiver of the corporation is appointed by a court of equity of one state, or if the corporation has made an assignment for the benefit of creditors, and the court has made an assessment, such receiver or assignee will be permitted to maintain an action at law in another state to recover the amounts unpaid thereunder: *Glenn* v. *Williams*, 60 Md. 93; *Patterson* v. *Lynde*, 112 Ill. 196, 206; *Dayton* v. *Borst*, 31 N. Y. 435, 438.

JUDGMENT AGAINST CORPORATION IS CONCLUSIVE IN CREDITOR'S SUIT TO REACH UNPAID SUBSCRIPTIONS. — Since a judgment conclusively establishes the plaintiff's claim against parties and privies, and cannot be collaterally attacked, except for fraud or want of jurisdiction, it follows that, as the stockholders are represented in the action by the corporation, a judgment against the corporation is conclusive as to the extent and validity of the creditor's demand in his collateral suit against the stockholders to compel the payment of their unpaid subscriptions, unless the judgment can be impeached for fraud or for the want of jurisdiction: Cook on Stock and Stockholders, sec. 209; 2 Morawetz on Corporations, sec. 865; *Marsh* v. *Burroughs*, 1 Woods, 463; *Bisset* v. *Kentucky River Nav. Co.*, 15 Fed. Rep. 353; *Glenn* v. *Springs*, 28 Id. 494; *Glenn* v. *Williams*, 60 Md. 93; *Bank of Wooster* v. *Stevens*, 1 Ohio St. 233; *Henry* v. *Vermillion etc. R. R.*, 17 Ohio, 187, 190; compare *Hastings* v. *Drew*, 76 N. Y. 9; *Stephens* v. *Fox*, 63 Id. 313. Of course this does not preclude a

stockholder from setting up special defenses which he may have to his personal liability. The same rules should, on principle, apply in proceedings to enforce the statutory liability of stockholders: See *post*, this note.

PARTIES TO BILL IN EQUITY. — While it is not necessary that all the creditors should be actually parties plaintiff in the equitable suit to compel the payment of unpaid subscriptions, nevertheless the suit must be in behalf of all: Cook on Stock and Stockholders, sec. 205; Thompson's Liability of Stockholders, sec. 351; 2 Morawetz on Corporations, secs. 864, 866; *Ogilvie* v. *Knox Ins. Co.*, 22 How. 380; *Marsh* v. *Burroughs*, 1 Woods, 463, 467; *Holmes* v. *Sherwood*, 3 McCrary, 405, 408; 16 Fed. Rep. 725, 727; *Cleveland Rolling Mill Co.* v. *Texas etc. R'y*, 27 Fed. Rep. 250; *Adler* v. *Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57, 62; *Coleman* v. *White*, 14 Id. 700; 80 Am. Dec. 797; *Mann* v. *Pentz*, 3 N. Y. 415; *Brundage* v. *Monumental G. & S. Min. Co.*, 12 Or. 322; *Crease* v. *Babcock*, 10 Met. 531; *Grew* v. *Breed*, 10 Id. 569, 575; *First Nat. Bank* v. *Hingham Mfg. Co.*, 127 Mass. 563; *Wetherbee* v. *Baker*, 35 N. J. Eq. 501; compare *Patterson* v. *Lynde*, 112 Ill. 196, 205; *Hickling* v. *Wilson*, 104 Id. 54; and see *Hightower* v. *Thornton*, 8 Ga. 486; 52 Am. Dec. 412; but the cases do not seem to be quite uniform.

The bill, on general, equitable principles, in order that the burden may be equalized, and a multiplicity of suits avoided, should be against all the stockholders, unless they are unknown, insolvent, beyond the jurisdiction of the court, or it is impracticable from their great number to bring them all before the court: Cook on Stock and Stockholders, sec. 206; Thompson's Liability of Stockholders, sec. 353; 2 Morawetz on Corporations, sec. 866; *Adler* v. *Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57, 62; *Coleman* v. *White*, 14 Id. 700, 702; *Mann* v. *Pentz*, 3 N. Y. 415; *Patterson* v. *Lynde*, 112 Ill. 196, 205; *Vick* v. *Lane*, 56 Miss. 681; *Bronson* v. *Wilmington L. Ins. Co.*, 85 N. C. 411; *Hadley* v. *Russell*, 40 N. H. 109; *Brickson* v. *Nesmith*, 46 Id. 371; *Rice* v. *Merrimac Hosiery Co.*, 56 Id. 114, 128; *Connecticut River Savings Bank* v. *Fiske*, 60 Id. 363, 368; although, according to a respectable line of authorities, this is not necessary; the suit may be brought against one, or any, or all, leaving those who are joined to seek their remedy over against those who may not be: *Marsh* v. *Burroughs*, 1 Woods, 463, 468; *Holmes* v. *Sherwood*, 3 McCrary, 405; 16 Fed. Rep. 725; *Ogilvie* v. *Knox Ins. Co.*, 22 How. 380; *Hatch* v. *Dana*, 101 U. S. 205, 210; *Brundage* v. *Monumental G. & S. Min. Co.*, 12 Or. 322. Thus, says Bradley, J., in *Marsh* v. *Burroughs*, *supra*, "a judgment creditor who has exhausted his legal remedy may pursue in a court of equity any equitable interest, trust, or demand of his debtor, in whosesoever hands it may be. And if the party thus reached has a remedy over against other parties for contribution or indemnity, it will be no defense to the primary suit against him that they are not parties. If a creditor were to be stayed until all such parties could be made to contribute their proportionate shares of the liability, he might never get his money"; and again, it is said in *Hatch* v. *Dana*, *supra*: "The liability of a subscriber for the capital stock of a company is several, and not joint. By his subscription, each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers; and in equity his liability does not cease to be several." Some of the authorities which adopt this view suggest a distinction between the case of a bill filed for the purpose of winding up an insolvent corporation, and reaching all the corporate assets, on the one hand, and a bill which has for its object simply the collection of a debt out of unpaid subscriptions, on the other; requiring all the

stockholders to be made defendants in the first case, unless some valid excuse be shown, but permitting the suit to be brought against one or any of them in the second case: See *Brundage* v. *Monumental C. & S. Min. Co.*, 12 Or. 322; *Hatch* v. *Dana*, 101 U. S. 205, 210.

The corporation itself, if in existence, should also be made a party defendant, so as to be bound by the decree: Cook on Stock and Stockholders, sec. 206; Thompson's Liability of Stockholders, sec. 361; *Adler* v. *Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57, 62; *Coleman* v. *White*, 14 Id. 700; 80 Am. Dec. 797; *Mann* v. *Pentz*, 3 N. Y. 415; *Patterson* v. *Lynde*, 112 Ill. 196, 205; *Perkins* v. *Sanders*, 56 Miss. 733. See the questions as to parties further considered, with reference to the statutory liability of stockholders, in this note, *post*.

DECREE IN EQUITABLE SUIT. — The different notions as to the nature of the creditor's bill, observed under the last preceding head, will evidently result in different rules concerning the decree. According to what may be considered the prevailing idea, the decree should be for the benefit of all the creditors who may choose to come in and prove their debts under it: *Moryan* v. *New York etc. R. R.*, 10 Paige, 290; 40 Am. Dec. 244; and a creditor who first proceeds should not thereby be entitled to priority over the others: See *Robinson* v. *Bank of Darien*, 18 Ga. 65, 108; compare *Miers* v. *Zanesville etc. Turnpike Co.*, 13 Ohio, 197; 11 Id. 273; *Jones* v. *Arkansas Mechanical etc. Co.*, 38 Ark. 17. On the other hand, the decree should be so moulded as to give the stockholders all the privileges to which they would have been entitled under the charter of the corporation, had the stock been called in by the directors: *Hightower* v. *Thornton*, 8 Ga. 486, 502; 52 Am. Dec. 412; and an equitable contribution is to be made by the court between all the stockholders, as far as may be: *Erickson* v. *Nesmith*, 46 N. H. 371. If the court makes an assessment, only so much of the unpaid capital as is necessary for the payment of the debts can be called in, and a *pro rata* apportionment is made: *Bell's Appeal*, 115 Pa. St. 88; 2 Am. St. Rep. 532; compare *Hickling* v. *Wilson*, 104 Ill. 54; but, it is held, the mere fact that the whole amount due from any stockholder may not be ultimately wanted for the payment of the creditors, if all the other solvent stockholders should pay their ratable proportions of what still remains due on their stock, will not authorize such stockholder to enjoin a receiver from proceeding to enforce the payment of the balance due from him in the first instance: *Pentz* v. *Hawley*, 1 Barb. Ch. 122; if any balance should remain in the receiver's hands after satisfying the debts of the corporation, and the expenses of executing the trust, it will be distributed among the several stockholders who have paid in full for their stock.

LIABILITY ONLY EXTENDS TO UNPAID SUBSCRIPTIONS. — Independently of an additional liability imposed for the benefit of creditors upon the stockholders of a corporation, by special charter, general acts of incorporation, or other statutes, a stockholder's liability is governed by his contract of subscription, and does not extend beyond the amount due thereon: Taylor on Corporations, sec. 700; 2 Morawetz on Corporations, sec. 831; *Seymour* v. *Sturgess*, 26 N. Y. 134; *Warfield* v. *Marshall County Canning Co.*, 72 Iowa, 666; 2 Am. St. Rep. 263; *Jones* v. *Jarman*, 34 Ark. 323, 328; *Ward* v. *Griswoldville Mfg. Co.*, 16 Conn. 593, 599. There is no common-law liability for the debts of the corporation: See *post*, this note. If, therefore, stock is fully paid up, there is no further liability in equity: *Warfield* v. *Marshall County Canning Co.*, *supra*; and see *post*. So where a constitution provided that "in no case shall any stockholder be individually liable in any amount over and above the amount of the stock owned by him or her," a stockholder whose

stock is fully paid up is not liable for a debt of the corporation: *Schricker* v. *Ridings*, 65 Mo. 208; *Gausen* v. *Buck*, 68 Id. 545. It results that solvent stockholders, beyond their unpaid subscriptions, are not bound to make up, for the benefit of creditors, the deficiency resulting from defaulting and insolvent stockholders: *South Carolina Mfg. Co.* v. *Bank of South Carolina*, 6 Rich. Eq. 227; compare *Haslett's Ex'rs* v. *Wotherspoon*, 1 Strob. Eq. 209. And a statute to which the stockholders did not consent, authorizing assessments against stockholders who have paid the full amount of their subscriptions, is a law impairing the validity of their contract with the company, and is therefore unconstitutional: *Ireland* v. *Palestine etc. Turnpike Co.*, 19 Ohio St. 369.

The unissued shares of stock of a corporation are not assets; and in the absence of a provision of its charter or other statute to the contrary, it is held, one to whom shares of stock have been transferred by the corporation gratuitously, does not, by accepting them, become a debtor of the company, or make himself liable to pay the nominal face of the shares, as upon a subscription for the stock, or a contract; and an action is not maintainable against him, by a creditor of the corporation, to compel him to pay for such shares: *Christensen* v. *Eno*, 106 N. Y. 97; compare *Coit* v. *North Carolina etc. Amalgamating Co.*, 14 Fed. Rep. 12; 15 Phila. 496.

It is the practice in some states to organize mining corporations with a nominal capital, bearing little or no relation to the real capital which the stockholders propose to contribute, and to issue the stock as fully paid up, subject to assessment as the needs of the company may require, in consideration of the transfer of the mining property to the corporation. In such a case, there is no subscribed stock; and a person who contracts with the company must be deemed to have contracted with a view only to such security as the property transferred to it may furnish, irrespective of the capital indicated by the charter: 2 Morawetz on Corporations, sec. 830. It is accordingly held that in a case arising in California, that the only liability of stockholders of such a corporation was the general constitutional and statutory personal liability imposed upon them for the corporate debts and liabilities and the liability of their stock to assessment by the corporation: *In re South Mountain Consolidated Mining Co.*, 8 Saw. 366; 14 Fed. Rep. 347, affirming 7 Saw. 30; 5 Fed. Rep. 403; so in *Ross* v. *Silver and Copper Island Min. Co.*, 29 N. W. Rep. 591 (Minn.), affirmed on rehearing in 31 Id. 219, it was decided, approving the preceding case, that where a statute, under which a mining corporation was formed, provided that no stock "issued or sold, purporting to be full paid, shall be subject to any further assessment in the hands of the lawful holder thereof without his consent," if the corporation sold, in good faith, at less than par value, shares of its stock purporting to be full paid, the creditors of the corporation had no recourse against the purchasers or holders of the stock for the difference between the par value and the price at which the shares were sold.

PAYMENT OF SHARES, HOW MADE — FULL-PAID SHARES. — Subscriptions to corporate stock need not, in the absence of statutory provisions requiring it, be paid for in cash; but any property which the corporation is authorized to purchase, or which is necessary for the purposes of its legitimate business, or any services for which the corporation would be entitled to expend its funds, may be received or rendered in payment: Cook on Stock and Stockholders, secs. 13, 15; Thompson's Liability of Stockholders, sec. 134; Boone on Corporations, sec. 112; 2 Morawetz on Corporations, sec. 825; Taylor on Corporations, sec. 701; *Coffin* v. *Ransdell*, 110 Ind. 417; *Brant* v. *Ehlen*, 59

Md. 1; *Liebke* v. *Knapp*, 79 Mo. 22; *Kehlor* v. *Lademann*, 11 Mo. App. 550; *Carr* v. *Le Fevre*, 27 Pa. St. 413. Such a contribution of property or services will, therefore, discharge the stockholder for unpaid subscriptions to the extent of their value. And the creditors will be bound by a valuation of the property or services in good faith, although it prove to be excessive: 2 Morawetz on Corporations, sec. 825; Cook on Stock and Stockholders, secs. 13, 44, 47; Thompson's Liability of Stockholders, sec. 134; *Coit* v. *Gold Amalgamating Co.*, 119 U. S. 343, affirming 14 Fed. Rep. 12; 15 Phila. 496; *Phelan* v. *Hazard*, 5 Dill. 45; *Van Cott* v. *Van Brunt*, 82 N. Y. 535; *Coffin* v. *Ransdell*, 110 Ind. 417; *Brant* v. *Ehlen*, 59 Md. 1; see, under the English companies' acts, *Leeke's Case*, L. R. 11 Eq. 100; S. C. on appeal, L. R. 6 Ch. 469; *Disderi's Case*, L. R. 11 Eq. 242; *Syker's Case*, L. R. 13 Eq. 255; *Forbes's Case*, L. R. 5 Ch. 270; *Anderson's Case*, L. R. 7 Ch. D. 75; and compare *Schroder's Case*, L. R. 11 Eq. 131; *Coates's Case*, L. R. 17 Eq. 169; *Ferrao's Case*, L. R. 9 Ch. 355; also *Currie's Case*, 3 De Gex, J. & S. 367; *Leifchild's Case*, L. R. 1 Eq. 231; *Ashworth* v. *Bristol etc. R'y*, 15 L. T., N. S., 561; *Guest* v. *Worcester etc. R'y*, L. R. 4 C. P. 9; *Pell's Case*, L. R. 5 Ch. 11; *Baron De Beville's Case*, L. R. 7 Eq. 11; *Dent's Case*, L. R. 15 Eq. 407; 8 Ch. 775; *Fothergill's Case*, L. R. 8 Ch. 270; *Spargo's Case*, L. R. 8 Ch. 407; *Brown's Case*, L. R. 9 Ch. 102; *Carling's Case*, L. R. 1 Ch. D. 115; "there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account": *Coit* v. *Gold Amaljamating Co.*, *supra*.

In New York, the act of 1853, amendatory of the act of 1848, authorizing the formation of corporations for manufacturing and other purposes, confers authority upon the trustees of such corporations to purchase property "necessary for their business, and to issue stock to the amount of the value thereof, in payment therefor"; and by section 10 of the act of 1848, stockholders of such corporations are made severally individually liable to the creditors of the company to an amount equal to the stock held by them respectively, until the whole capital stock shall have been paid in. It has been held, under these acts, that when the stock was fully paid up, in money or property, the stockholders were released from personal liability: *Boynton* v. *Hatch*, 47 N. Y. 225; *Douglass* v. *Ireland*, 73 Id. 100; but if exemption from personal liability is sought by the holders of stock originally issued for property, a creditor may impeach the transaction for fraud: *Boynton* v. *Hatch*, *supra;* although a mere mistake or error of judgment by the trustees, either as to the necessity of the purchase, or as to the value of the property so purchased, if made in good faith, and not to evade the statute, will not subject a holder of the stock issued in payment of the property purchased to such liability: *Schenck* v. *Andrews*, 57 N. Y. 133; *Boynton* v. *Andrews*, 63 Id. 93; *Douglass* v. *Ireland*, *supra*.

But payment of stock subscriptions is good, as against creditors, only when made in money, or in what may fairly be considered as money's worth: *Wetherbee* v. *Baker*, 35 N. J. Eq. 501. Thus where a corporation was organized for the manufacture of a patented article, and its capital stock was taken by the defendants in exchange for their interest in the patent, which proved to be worthless, the defendants having paid no value for their stock, are liable to the creditors as for unpaid subscriptions: *Chisholm* v. *Forpy*, 65 Iowa, 333; and see, to the same effect, *Thurston* v. *Duffy*, 38 Hun, 327. The trust for the benefit of creditors of a corporation in unpaid subscriptions cannot be defeated or the fund impaired by any simulated or pretended payment for the stock, or any device short of actual payment: *Sawyer* v. *Hoag*, 17 Wall. 610; *Crawford* v. *Rohrer*, 59 Md. 599, 604; and see *Goodwin* v. *McGehee*, 15 Ala.

242, 246.) Any arrangement, therefore, by which the stock is but nominally paid for, whether in money or property, the corporation not in fact getting the benefit of the price in good faith, is not a valid payment as against the creditors of the corporation, however it may be regarded as between the corporation and the stockholder: *Crawford* v. *Rohrer, supra.* So where the officers of a corporation made an arrangement with themselves as stockholders, whereby paid-up certificates were issued to themselves, in consideration of real estate conveyed at a price understood to be many times its real value, as between such stockholders and a creditor, the stock will be considered paid only to the extent of the fair value of the property conveyed: *Osgood* v. *King*, 42 Iowa, 478; and "as between the creditors of the corporation and the original holders of the stock, as in the case here, it in no manner affects the rights of the former that the stock has been issued as fully paid-up stock; for their rights depend, not upon the mere appearance of things, but upon the actual *bona fide* payment by the stockholder, whether that payment be alleged to have been made in money or property": *Crawford* v. *Rohrer*, 59 Md. 599, 604.

As a rule, a corporation cannot issue its stock at less than the par value, as fixed by the charter: Taylor on Corporations, sec. 702; *Hawley* v. *Upton*, 102 U. S. 314; *Jackson* v. *Traer*, 64 Iowa, 469; 52 Am. Rep. 449; *Chouteau* v. *Dean*, 7 Mo. App. 210; *Kehlor* v. *Lademann*, 11 Id. 550; but see *Christensen* v. *Eno*, 106 N. Y. 97 (where unissued shares of stock were transferred by the corporation gratuitously, without creating any liability in the transferee); and *In re South Mountain Consol. Min. Co.*, 8 Saw. 366; 14 Fed. Rep. 347, affirming 7 Saw. 30; 5 Fed. Rep. 403; *Ross* v. *Silver and Copper Island Min. Co.*, 29 N. W. Rep. 591 (Minn.), affirmed on rehearing 31 Id. 219 (cases of mining corporations discussed *supra*). Compare the following English cases reaching a different conclusion: *In re Dronfield Silkstone Coal Co.*, L. R. 17 Ch. D. 76; *In re Ambrose Lake T. & C. Min. Co.*, L. R. 14 Ch. D. 390; *In re Ince Hall Rolling Mills Co.*, 30 Week. Rep. 945. Thus where one, by his contract of subscription, agreed to pay but twenty per cent of the par value of the stock, which purported to be non-assessable, he can nevertheless be compelled to pay the remaining eighty per cent at the suit of the company's assignee in bankruptcy: *Hawley* v. *Upton, supra;* and where ten thousand dollars of stock was issued by a corporation as "full-paid" to an officer thereof, in payment of services rendered by him valued at two thousand five hundred dollars, the stock being taken at its market value of twenty-five per cent, such officer was nevertheless held liable to creditors of the corporation to the extent of the difference between the value of his services and the par value of the stock: *Chouteau* v. *Dean, supra;* and in *Jackson* v. *Traer, supra*, it was also decided that where stock of an embarrassed corporation was issued to creditors in settlement of a demand, which it had no other means of paying, at a certain per cent of the nominal value of the stock, that the creditors were liable for the unpaid balance; and in *Flinn* v. *Bagley*, 7 Fed. Rep. 785, it was further held that where the defendants subscribed to the increased capital stock of an embarrassed corporation, with the understanding embodied in the subscription, assented to by the stockholders, that they were to receive the stock at sixty-six and two thirds cents on the dollar, which was all that it was worth, the assignee in bankruptcy might, notwithstanding, collect the remaining one third of the par value of the stock for the benefit of future creditors; but that the arrangement was binding upon the stockholders, because they assented to it, and it was not a fraud upon existing creditors, because the assets of the corporation were increased by the

amount of money actually paid in, and to that extent they were benefited by the subscription; but, on the other hand, in *Clark* v. *Bever*, 31 Fed. Rep. 670, it was decided by Love, D. J., in an elaborate and convincing opinion, in which he strongly criticises *Jackson* v. *Traer*, *supra*, that while an agreement between a corporation and a subscriber by which the latter was to pay less than the par value of his stock is, in general, invalid as to the creditors of the corporation, and also as to other stockholders who did not consent thereto, yet if the agreement would prove a benefit rather than an injury to the creditors and stockholders, they cannot complain. Therefore, where a corporation was insolvent, and its stock worthless, and certain of its creditors, in payment of a debt due them, accepted in good faith, by resolution spread on the minutes of the corporation, unissued stock at twenty cents on the dollar, they are not liable to a judgment creditor of the company for the eighty cents remaining unpaid on each dollar, although the debt on which the judgment was recovered was subsequently contracted, the creditor being assumed to have had notice of the transaction. The justice and good sense of this decision are apparent.

While it is thus true that a corporation cannot, as a general rule, issue its stock at less than the par value, and preclude its creditors from compelling the payment of the difference between the par value and the amount paid for the stock, it is equally true that purchasers of stock, issued as full-paid, in good faith, and without notice that it was not in fact full-paid, cannot be held for the unpaid portion, either by the corporation, or its representatives, or its creditors: Cook on Stock and Stockholders, sec. 50; Thompson's Liability of Stockholders, sec. 135; 2 Morawetz on Corporations, sec. 836; Taylor on Corporations, sec. 702; 2 Waterman on Corporations, 138; *Foreman* v. *Bigelow*, 4 Cliff. 508; *Steacy* v. *Little Rock etc. R. R.*, 5 Dill. 348; *Phelan* v. *Hazard*, 5 Id. 45; *Cleveland Rolling Mill Co.* v. *Texas etc. R'y*, 27 Fed. Rep. 250; *Brant* v. *Ehlen*, 59 Md. 1; *Keystone Bridge Co.* v. *McCluney*, 8 Mo. App. 496; *Erskine* v. *Loewenstein*, 82 Mo. 301, affirming 11 Mo. App. 595; *Waterhouse* v. *Jamieson*, L. R. 2 H. L. 29. Thus it is said in *Brant* v. *Ehlen*, *supra*, that "where shares are issued by the company to the subscriber as full-paid shares, and are sold by the subscriber as such, there is no ground on which a promise can be implied on the part of the purchaser, without notice, to be answerable, either to the company or to its creditors, should the representations on the faith of which he purchased prove to be false. He could not be held liable on the ground of contract, because he never agreed to purchase any other shares than full-paid shares; and if it be said that the shares were fraudulently issued, he could not be held liable on the ground of fraud, because he was in no sense a party to the fraud." So "a share of stock in the ordinary form is to be taken to be paid up, in the absence of anything appearing to the contrary; and it can make no difference whether the certificate says on its face that the stock is fully paid, or says nothing about it": *Keystone Bridge Co.* v. *McCluney*, 8 Mo. App. 496, 501. The presumption is, that a certificate, in the usual form, is full-paid; and a purchaser who takes it without notice to the contrary is not liable to creditors as for unpaid stock: *Johnson* v. *Lullman*, 15 Id. 55, affirmed in 88 Mo. 567. But a certificate that stock is "full-paid stock" is not conclusive as against the creditors, who may show, as against the original holder from the corporation, that no consideration was paid therefor: *A. Wight Co.* v. *Steinkemeyer*, 6 Mo. App. 574; or that only a part of the par value of the stock has been paid: *Pickering* v. *Templeton*, 2 Id. 424; and where the words "non-assessable" are written or printed across the face of certificates, the stockholders are nevertheless liable to pay

whatever remains unpaid upon the stock whenever it becomes necessary that such payments should be made for the purpose of discharging the debts of the company: *Upton* v. *Burnham*, 3 Biss. 520. At most, the legal effect of the words is a stipulation against liability from further assessments after the entire subscription shall have been paid: *Upton* v. *Tribilcock*, 91 U. S. 45. And where stock, in the contract of subscription, purports to be non-assessable, it can only mean that no assessment would be made beyond the percentage the subscriber had specially bound himself to pay, unless the legal liabilities of the company required it: *Hawley* v. *Upton*, 102 Id. 314, 316.

WITHDRAWAL AND RELEASE OF STOCKHOLDERS, AND FORFEITURE OF STOCK, AS AFFECTING LIABILITY FOR UNPAID SUBSCRIPTIONS. — It is clear that a share-holder cannot relieve himself, at his own pleasure, from liability, either to the corporation or to its creditors, for unpaid subscriptions by any attempted withdrawal from the corporation: *United Society* v. *President etc. of Eagle Bank*, 7 Conn. 456; *Trustees of Bishop's Fund* v. *President etc. of Eagle Bank*, 7 Id. 476; *Gaff* v. *Flesher*, 33 Ohio St. 107, 112; *Chouteau* v. *Dean*, 7 Mo. App. 210; *Haskell* v. *Sells*, 14 Id. 91; and a provision in the charter of a corporation that the stock of a delinquent subscriber shall be forfeited, being for the benefit of the corporation, and not for the stockholder, is not to be construed as a privilege of the stockholder to abandon his shares at will: *Hightower* v. *Thornton*, 8 Ga. 486; 52 Am. Dec. 412. And since the unpaid subscriptions constitute a trust fund for the benefit of creditors of the corporation, it is equally clear that a stockholder cannot be altogether released from liability for unpaid subscriptions, or his liability therefor limited, by any agreement or arrangement between himself and the corporation or its agents, or by any resolution adopted by its directors, or by the stockholders themselves, to the prejudice of its creditors: Cook on Stock and Stockholders, secs. 168, 170; Thompson's Liability of Stockholders, sec. 201; 2 Morawetz on Corporations, secs. 824, 841; Taylor on Corporations, sec. 745; note to *Freeland* v. *McCullough*, 699, 700; *Burke* v. *Smith*, 16 Wall. 390, 395, affirming in part *Putnam* v. *New Albany*, 4 Biss. 365; *Upton* v. *Tribilcock*, 91 U. S. 45; *Webster* v. *Upton*, 91 Id. 65, 71; *County of Morgan* v. *Allen*, 103 Id. 498; *Scovill* v. *Thayer*, 105 Id. 143; *Upton* v. *Hansbrough*, 3 Biss. 417; *Upton* v. *Jackson*, 1 Flipp. 413; *Mann* v. *Cooke*, 20 Conn. 178; *Crandall* v. *Lincoln*, 52 Id. 73; 52 Am. Rep. 560; *Zirkel* v. *Joliet Opera House Co.*, 79 Ill. 334; *Singer* v. *Given*, 61 Iowa, 93; *Rider* v. *Morrison*, 54 Md. 429, 444; *Farnsworth* v. *Robbins*, 36 Minn. 369; *Vick* v. *La Rochelle*, 57 Miss. 602; *Gill* v. *Balis*, 72 Mo. 424; *Chouteau Ins. Co.* v. *Floyd*, 74 Id. 280, 291; *Chouteau* v. *Dean*, 7 Mo. App. 210; *Haskell* v. *Sells*, 14 Id. 91; *Slee* v. *Bloom*, 19 Johns. 456; 10 Am. Dec. 273; *Sagory* v. *Dubois*, 3 Sand. Ch. 466; *Gaff* v. *Flesher*, 33 Ohio St. 107, 112; compare *Directors etc.* v. *Kisch*, L. R. 2 H. L. 99; *Smith's Case*, L. R. 2 Ch. 604. And where persons became stockholders of a corporation, with the understanding that calls were not to exceed a certain per cent, and afterwards calls are made in excess of that amount, to compensate for which second-mortgage bonds were issued to such stockholders, they are liable to creditors of the corporation, as for unpaid stock, to the amount realized by a sale of the bonds: *Skrainka* v. *Allen*, 7 Mo. App. 434, affirmed in 76 Mo. 384; compare *Keystone Bridge Co.* v. *Barstow*, 8 Mo. App. 494. So a stockholder cannot be permitted to reduce the number of his shares of stock, with the consent of the stockholders or of the directors, so as to affect the rights of existing creditors: *Payne* v. *Bullard*, 23 Miss. 88; 55 Am. Dec. 74; and an agreement between the officers of a corporation and a stockholder to consolidate the stock held by him will not affect the rights of existing creditors of

the corporation, or of the other stockholders, who were not parties to the arrangement: *Mann* v. *Currie*, 2 Barb. 294; so an attempt on the part of a portion of the stockholders to withdraw from it, under a resolution of the board of directors, before all the debts are paid, will be none the less void as to the creditors of the corporation because enough remains to meet the claims of the creditors: *Gill* v. *Balis*, 72 Mo. 424.

Under certain circumstances, however, the agreement or arrangement may be effective in discharging or limiting the liability of stockholders to creditors. It is plain that if a creditor be a consenting party, or is clearly not prejudiced, he will be bound. Thus in *Sles* v. *Bloom*, 19 Johns. 456, 10 Am. Dec. 273, where, by an act under which a corporation was formed, the persons composing the company at the time of its dissolution were made individually responsible to the extent of their stock for its debts then due and owing, it was held that a resolution allowing the stockholders to forfeit their stock, on the payment of a certain per cent, was void as against a creditor who, although a trustee, protested against the resolution, notwithstanding he accepted money raised under it; but a resolution that any stockholder paying certain sums already called from his shares should not be proceeded against for any further calls, except by way of forfeiture of stock, to which the creditor assented, discharged those who complied with the resolution from further responsibility to him; and in *Kenton Furnace R. R. etc. Co.* v. *McAlpin*, 5 Fed. Rep. 737, it was held that a corporation might agree, in consideration of the surrender to it by the stockholders of accumulated profits, and of the increased value of its property, to treat its stock as fully paid up, and issue full-paid certificates, and that the arrangement was binding upon the corporation, the stockholders, all of whom assented thereto, existing creditors who also assented, and subsequent creditors with notice, but not as to non-assenting existing creditors. So where a corporation, by resolution of its stockholders, reduces the amount of its capital stock and issues full-paid certificates to take up the partly paid certificates at a certain proportion of the face thereof, it is held that the reduction of the stock did not relieve those who were stockholders at the time from liability on the contracts then existing against the company, but the stockholders to whom full-paid certificates were issued would not be liable on contracts made after the date of the reduction: *In re State Ins. Co.*, 11 Biss. 301; 14 Fed. Rep. 301; and in *Erskine* v. *Peck*, 13 Mo. App. 280, affirmed in 83 Mo. 465, it was also held that one who surrendered to a corporation stock issued to him as full-paid, but for which he had paid nothing, and which the corporation again issued for value to *bona fide* subscribers, was not liable as a stockholder to one who became a creditor of the corporation long after the surrender, the corporation, its capital stock, and the security of its creditors suffering thereby no real impairment or prejudice by the transaction; and again, in *Johnson* v. *Lullman*, 15 Mo. App. 55, affirmed in 88 Mo. 567, it was held, following this latter case, that a stockholder who surrendered unpaid stock to the corporation was not liable to a corporate creditor whose demand accrued after the surrender. So, although the capital stock of a corporation is a trust fund for the benefit of creditors, the legislature may so modify the charter as to relieve stockholders from any future liability on their subscriptions: *Robinson* v. *Bank of Darien*, 18 Ga. 65; but evidently this would impair the obligation of contracts, and could not be done as to non-assenting existing creditors; but an act of the legislature authorising the reduction of the stock of a corporation to the amount paid in at a certain time, and accepted by the stockholders, will relieve the latter from further liability as to creditors who

have become such since the reduction: *Hepburn* v. *Comm'rs of Exchange and Banking Co.*, 4 La. Ann. 87; *Palfrey* v. *Spaulding*, 7 Id. 363; *Stark* v. *Burke*, 9 Id. 341.

A *bona fide* compromise between a corporation and a share-holder, by which the subscription of the latter is canceled, furthermore, is binding upon the creditors as well as upon the corporation itself: Cook on Stock and Stockholders, sec. 171; Thompson's Liability of Stockholders, sec. 202; 2 Morawetz on Corporations, sec. 841; Taylor on Corporations, sec. 746; *New Albany* v. *Burke*, 11 Wall. 96, reversing in part *Putnam* v. *New Albany*, 4 Biss. 365; *Steacy* v. *Little Rock etc. R. R.*, 5 Dill. 348; *Gelpcke* v. *Blake*, 19 Iowa, 263; *Lord Belhaven's Case*, 3 De Gex, J. & S. 41.

If the shares of a stockholder have been validly forfeited, moreover, for non-payment of calls, under a power conferred upon the corporation by its charter, the relation between the stockholder and the corporation is thereby terminated, and he cannot afterwards be held liable by corporate creditors for unpaid subscriptions, in the absence of collusion: Cook on Stock and Stockholders, sec. 127; Thompson's Liability of Stockholders, sec. 193; 2 Morawetz on Corporations, sec. 857; Taylor on Corporations, sec. 746; *Allen* v. *Montgomery R. R.*, 11 Ala. 437; *Mills* v. *Stewart*, 41 N. Y. 384; *Macauly* v. *Robinson*, 18 La. Ann. 619. "The power of declaring a forfeiture of shares is conferred upon a corporation solely for the purpose of compelling the subscribers to pay their dues promptly, and thus to increase the amount of the common fund. It was not conferred, and cannot be exercised, for the purpose of discharging stock subscribers from liability to creditors in case the company should prove a failure": 2 Morawetz on Corporations, sec. 857. Of course further liability to the corporation itself is gone by the forfeiture: *Small* v. *Herkimer Mfg. Co.*, 2 N. Y. 330; *Mechanics' Foundry etc. Co.* v. *Hall*, 121 Mass. 272; *Ashton* v. *Burbank*, 2 Dill. 435; *King's Case*, L. R. 2 Ch. 714, 719, 731; *Knight's Case*, L. R. 2 Ch. 321.

CONDITIONS LIMITING OR RELIEVING LIABILITY OF SUBSCRIBERS FOR UNPAID SUBSCRIPTIONS.— Without entering into any discussion of conditional subscriptions to capital stock generally, or their binding force upon the corporation or other share-holders (see note to *Parker* v. *Thomas*, 81 Am. Dec. 392), it is enough for our present purpose to state the very evident proposition that a subscription, unconditional on its face, cannot be controlled or qualified, as to creditors of the corporation, by any private understanding or agreement between the subscriber and the officers or other agents of the corporation, by which the subscriber's liability, according to the terms of the subscription, is released or in any way lessened: *Jewell* v. *Rock River Paper Co.*, 101 Ill. 57; *Hickling* v. *Wilson*, 104 Id. 54; *Peychaud* v. *Hood*, 23 La. Ann. 732; *Saffold* v. *Barnes*, 39 Miss. 399; *Haskell* v. *Selle*, 14 Mo. App. 91; *Burke* v. *Smith*, 16 Wall. 390, 397, affirming in part *Putnam* v. *New Albany*, 4 Biss. 365; 2 Morawetz on Corporations, sec. 842; Cook on Stock and Stockholders, secs. 137, 138. Aside from the objection that the general rules of evidence will not permit the contract of subscription to be thus varied or modified, persons dealing with the corporation have a right to rely upon the subscriptions as they purport to be, and it would be a fraud upon them to permit a subscriber to show that his apparently unconditional subscription was in fact conditional. It has even been held that a subscriber to the stock of a corporation could not, in an action against the stockholders by the corporate creditors to compel the payment of unpaid subscriptions, set up a secret collateral agreement between himself and the company, by which his subscription was to be paid in land instead of money: *Noble* v. *Callender*, 20

Ohio St. 199; and that an agreement incorporated into the contract of subscription itself, limiting the liability of the subscribers to the installments paid by them, and providing that the stock shall be non-assessable, is void as against the creditors of the corporation, at all events creditors without notice thereof: *Union M. L. Ins. Co.* v. *Frear Stone Mfg. Co.*, 97 Ill. 537; 37 Am. Rep. 129. The failure of a corporation to complete the work for which the corporation was established, within the period named by its agent when soliciting subscriptions, such a completion not having been made a condition of the subscriptions, and the subscribers, by not paying the subscriptions, having retarded the work, will not discharge the subscribers from their statutory obligation to satisfy the claims of creditors: *Pickering* v. *Templeton*, 2 Mo. App. 424. Plainly, a subscriber cannot plead in avoidance of his liability to the creditors of the corporation that he merely signed, at the request of the agent of the company, as an inducement for others to subscribe, with the understanding that when this end had been served his name should come off the list: *Pickering* v. *Templeton*, *supra*. If one who makes a conditional subscription desires to take advantage of the condition which has not been complied with, he should promptly require the subscription to be canceled, and not wait until debts have accrued against the company before taking any action: *Lee* v. *Imbrie*, 13 Or. 510.

FRAUD AND MISTAKE AS AFFECTING STOCKHOLDERS' LIABILITY FOR UNPAID SUBSCRIPTIONS. — The rule that a contract obtained by fraud is voidable at the election of the defrauded party applies to the contract of a shareholder in a corporation. Therefore if one is induced to subscribe for or purchase shares of stock of a corporation through the fraud of its agents, he may have all the remedies, affirmative and defensive, against the corporation which he might have had against a principal in any other similar case: See Cook on Stock and Stockholders, secs. 135 et seq.; Thompson's Liability of Stockholders, secs. 142 et seq.; note to *Parker* v. *Thomas*, 81 Am. Dec. 392. But the contract entered into through fraud is voidable merely, and not absolutely void. It is valid and binding until the defrauded party elects to treat it as void. And if he fails to repudiate it before the rights of innocent third parties have intervened, their equities to treat it as valid may be superior to his claim to avoid it. Thus in *Upton* v. *Tribilcock*, 91 U. S. 45, 55, Miller, J., dissenting, says: "I am of the opinion that where an agent of an existing corporation procures a subscription of additional stock in it by fraudulent representations, the fraud can be relied on as a defense to a suit for unpaid installments when suit is brought by the corporation, and that if the stockholder has in reasonable time repudiated the contract, and offered to rescind before the insolvency or bankruptcy of the corporation, the defense is valid against the assignee of the corporation." Again, Dillon, J., in *Upton* v. *Englehart*, 3 Dill. 496, 499, uses the following language: "The effect of fraud practiced to induce a contract to subscribe to stock or purchase shares is, as respects the company and the person deceived, the same as in other contracts, with the modifications arising from the peculiar nature of the transaction as to repudiating or rescinding the contract"; but he continues, page 501: "The proposition is not a sound one, that the right of a person, who has been drawn into the purchase of stock by the fraud of a company or its agents, to relief is as great against creditors as it would be against the company. If the contest is with the company, it is essentially one with the alleged share-holder's own partners or associates, and if their corporate respresentative or its agents have practiced a fraud upon him, he is entitled to relief against it. But if a person has accepted a certificate of

stock, and becomes, to all external appearance, a stockholder, persons may have become creditors of the company on the faith of his membership, and in law are presumed to do so, and as they cannot know the manner in which he was induced to become a stockholder, there is ground to maintain that as to them the matter is immaterial." It is therefore settled that if a shareholder, whose subscription was obtained through the fraud of the company's agents, has not been vigilant in discovering the fraud and in repudiating the contract, it will be no defense as to creditors of the corporation, and that in general it will be too late for him to set up the fraud after the corporation has become insolvent or bankrupt: *Ogilvie* v. *Knox Ins. Co.*, 22 How. 380; *Upton* v. *Tribilcock*, 91 U. S. 45; *Chubb* v. *Upton*, 95 Id. 665, 667; *Upton* v. *Englehart*, 3 Dill. 496; *Farrar* v. *Walker*, 3 Id. 506, note; *Upton* v. *Jackson*, 1 Flipp. 413; *Upton* v. *Hansbrough*, 3 Biss. 417; note to *Germantown Passenger R'y* v. *Fitler*, 100 Am. Dec. 556; see also, in England, under the companies' acts, *Oakes* v. *Turquand*, L. R. 2 H. L. 325, the leading case; *Stone* v. *City and County Bank*, L. R. 3 C. P. D. 307; *Henderson* v. *Royal British Bank*, 7 El. & B. 356; *Dossett* v. *Harding*, 1 Com. B., N. S., 524; *Parvis* v. *Harding*, 1 Id. 533; *Daniell* v. *Royal British Bank*, 1 Hurl. & N. 681; *Reese River etc. Min. Co.* v. *Smith*, L. R. 4 H. L. 64; *McNeill's Case*, L. R. 10 Eq. 503; *Pugh and Sharman's Case*, L. R. 13 Eq. 572; *Wright's Case*, L. R. 7 Ch. 60; *Peel's Case*, L. R. 2 Ch. 674; *Houldsworth* v. *City of Glasgow Bank*, L. R. 5 App. Cas. 317; *In re Ætna Ins. Co.*, 6 I. R. Eq. 298; also *Brockwell's Case*, 4 Drew. 235; *Ayre's Case*, 25 Beav. 513; *Blake's Case*, 34 Id. 639; and see, further, Thompson's Liability of Stockholders, secs. 143–150; 2 Morawetz on Corporations, secs. 839, 840; Taylor on Corporations, sec. 744; *Saffold* v. *Barnes*, 39 Miss. 399; *Schaeffer* v. *Missouri Home Ins. Co.*, 46 Mo. 248; *Briggs* v. *Cornwell*, 9 Daly, 436; *Turner* v. *Grangers' L. & H. Ins. Co.*, 65 Ga. 649; 38 Am. Rep. 801; *Hamilton* v. *Grangers' L. & H. Ins. Co.*, 67 Ga. 145. Some of the authorities seem to favor the view that in no case can fraud in obtaining the subscription be set up by the subscriber after the insolvency or bankruptcy of the corporation. This may be true under the English companies' act of 1862, by which it appears a creditor is entitled to hold every share-holder whose name is on the register of the company at the time proceedings are instituted to wind up the company for insolvency; but in America there seems to be no reason for the universality of the rule. Thus in *Upton* v. *Englehart*, 3 Dill. 496, 505, Dillon, J., remarks: "I am inclined to the opinion that if a company has fraudulently misrepresented or concealed material facts, and thus drawn an innocent person into the purchase of stock, he at the time being guilty of no want of reasonable caution and judgment, and afterwards guilty of no laches in discovering the fraud, and he thereupon without delay notifies the company that he repudiates the contract and offers to rescind the purchase, these facts concurring, I am inclined to the opinion that the bankruptcy of the company subsequently appearing will not enable the assignee to insist that the purchase of stock is binding upon him."

It is unnecessary to stop to inquire what constitutes fraud within the meaning of the foregoing rules: See note to *Parker* v. *Thomas*, 81 Am. Dec. 385. However, it may here be noticed that misrepresentations by the agent of a corporation as to the non-assessability of its stock, beyond a certain amount, being held to be a misrepresentation of law and not of fact, cannot be availed of by a subscriber in a suit against him by the assignee in bankruptcy of the corporation to enforce his unpaid subscriptions: *Upton* v. *Tribilcock*, 91 U. S. 45. But it is possible for the agent of a corporation, formed in one state, to make fraudulent representations concerning the laws of an-

other state, and the provisions of the charter of the corporation granted therein, to the effect that the stock is non-assessable; and if the subscriber relied thereon, he is entitled, in the absence of laches and acquiescence, to resist further payment: *Upton* v. *Englehart*, 3 Dill. 496, 501.

The case of a subscription entered into under a mistake of fact is probably governed, as far as creditors are concerned, by the same general principles which govern the case of fraud. In order to take advantage of it, the subscriber would be obliged to act promptly. But in an action against a subscriber, brought by the assignee of a bankrupt corporation, to recover for unpaid subscriptions, it is no defense for the subscriber to show ignorance on his part of the condition and circumstances of the company at the time of subscribing: *Payson* v. *Withers*, 5 Biss. 269; and of course it would be no defense that he was ignorant of the legal effect of the subscription contract which he signs: *New Albany etc. R. R.* v. *Fields*, 10 Ind. 187; *Clear* v. *Newcastle etc. R. R.*, 9 Id. 488; see also, on this question, Thompson's Liability of Stockholders, sec. 144; Cook on Stock and Stockholders, sec. 196.

STOCKHOLDERS CANNOT SET OFF DEBTS DUE THEM BY INSOLVENT CORPORATION WHEN SUED FOR UNPAID SUBSCRIPTIONS.— Since if a corporation is insolvent, each creditor is equitably entitled to receive a ratable share of its assets, it follows that in a suit by judgment creditors of an insolvent corporation, whose executions have been returned unsatisfied, or by the assignee of a corporation in bankruptcy or insolvency, or for the benefit of creditors, to compel the payment of unpaid subscriptions, stockholders cannot set off debts due them by the corporation: Cook on Stock and Stockholders, sec. 193; Thompson's Liability of Stockholders, secs. 382 et seq.; 2 Morawetz on Corporations, sec. 861; Taylor on Corporations, sec. 729; 2 Waterman on Corporations, 130; *Sawyer* v. *Hoag*, 17 Wall. 610; *Scammon* v. *Kimball*, 92 U.S. 362, 366; *Scovill* v. *Thayer*, 105 Id. 143; *Wilbur* v. *Stockholders of Glen Iron Works*, 18 Nat. Bank. Reg. 178; 13 Phila. 479, 492; *Singer* v. *Given*, 61 Iowa, 93; *Willams* v. *Traphagen*, 38 N. J. Eq. 57; *Lawrence* v. *Nelson*, 21 N. Y. 158; *Hillier* v. *Allegheny County M. Ins. Co.*, 3 Pa. St. 470; *Macungie Savings Bank* v. *Bastian*, 11 Rep. 785 (Pa.); compare *Jarman's Adm'r* v. *Benton*, 79 Mo. 148, *Webber* v. *Leighton*, 8 Mo. App. 502, *Merchants' Ins. Co.* v. *Hill*, 12 Id. 148, *Simmons* v. *Heman*, 17 Id. 444, in which the liability for unpaid stock was enforced in a special statutory manner, and the set-off allowed. The above rule applies in England to limited companies in winding up under the act of 1862; *Grissell's Case*, L. R. 1 Ch. 528, 536; *Barnett's Case*, L. R. 19 Eq. 449; *Calisher's Case*, L. R. 5 Eq. 214; *Black & Co.'s Case*, L. R. 8 Ch. 254; *Mulford's Case*, L. R. 14 Ch. D. 634; *Gill's Case*, L. R. 12 Ch. D. 755; but this is by virtue of statute. "The debts must be mutual," says Miller, J., in *Sawyer* v. *Hoag*, *supra*,—"must be in the same right. The case before us is not of that character. The debt which the appellant owed for his stock was a trust fund, devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally, in equity, to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim." "To permit him to set off the debt due him," says the court, in *Williams* v. *Traphagen*, *supra*, "would, where the corporation is insolvent, manifestly give him a preference as a creditor. To this he is not entitled." So if a judgment creditor of a corporation who files a bill against stockholders to reach the unpaid balance due on their subscriptions is himself also a stockholder, he must contribute *pari passu* with the defendants towards the liqui-

dation of his demand: *Bisset* v. *Kentucky River Nav. Co.*, 15 Fed. Rep. 353. But in *Wilbur* v. *Stockholders of Glen Iron Works*, *supra*, it was held that if the stockholders prove their debts in bankruptcy, deductions equal to their estimated respective dividends might perhaps be made from the amounts of the assignee's demands against them respectively as stockholders.

See *post*, this note, as to the right of set-off in actions by creditors of corporations to enforce the statutory liability of stockholders for the corporate debts.

STOCKHOLDERS ARE ESTOPPED FROM ATTACKING VALIDITY OF CORPORATE ORGANIZATION, ETC., IN SUIT TO COMPEL PAYMENT OF UNPAID SUBSCRIPTIONS. — In a suit by or on behalf of creditors of a corporation to compel the payment by stockholders of unpaid subscriptions, it is no defense that the corporation was not legally organized. Having dealt with it as a valid organization, they are estopped from alleging that it is not, for the purpose of relieving themselves from liability: *Upton* v. *Hansbrough*, 3 Biss. 417; *Gaff* v. *Flesher*, 33 Ohio St. 107; this is especially true where subscribers have been active participants in the management of the company's affairs for years: *Hickling* v. *Wilson*, 104 Ill. 54; and although a corporation was ousted from the franchise of being a corporation, on *quo warranto* it was held that "the rights of the creditors of the company and the liabilities of the stockholders in respect to the payment of the creditors were not affected by the judgment of ouster": *Rowland* v. *Meader Furniture Co.*, 38 Ohio St. 269, 272. On the other hand, a creditor cannot attack the validity of a corporate organization for the purpose of holding its members individually liable for his claim, as members of an unincorporated association: *Laflin etc. Powder Co.* v. *Sinsheimer*, 46 Md. 315; 24 Am. Rep. 522. On the same principle, where the stock of a corporation was attempted to be increased, those who become subscribers to or purchasers thereof are estopped from denying the regularity of the proceedings by which it was increased: *Chubb* v. *Upton*, 95 U. S. 665; *Upton* v. *Hansbrough*, 3 Biss. 417; *Upton* v. *Jackson*, 1 Flipp. 413; especially where they retain their stock, and continue to participate in the profits of the company, without denying their membership: *Payson* v. *Withers*, 5 Biss. 269; *Payson* v. *Stoever*, 2 Dill. 427. Nor is it any defense that the subscription is not binding because the whole authorized stock was never subscribed for: *Farnsworth* v. *Robbins*, 36 Minn. 369; S. P., *Hickling* v. *Wilson*, 104 Ill. 54. But in *Scovill* v. *Thayer*, 105 U. S. 143, it was held that certificates of stock issued in excess of the limit imposed by the charter of a corporation were void, and the holders of them were not entitled to the rights nor subject to the liabilities of holders of authorized stock; and a holder was not estopped from setting up the invalidity of such unauthorized stock, in an action against him to recover the balance unpaid thereon, by the fact that he attended the meeting at which it was voted to issue the same, or that he received and held certificates therefor, or that the officers and agents of the company represented its capital to be equal to the amount of both its authorized and unauthorized stock.

As to estoppels in actions by creditors of corporations to enforce the statutory personal liability of stockholders, see *post*, this note.

STATUTE OF LIMITATIONS DOES NOT RUN AGAINST CREDITORS' CLAIMS FOR UNPAID SUBSCRIPTIONS UNTIL CALL IS MADE OR CORPORATION CEASES TO BE GOING CONCERN. — Lapse of time, in accordance with a general principle of equitable jurisprudence, may preclude creditors of a corporation from coming into equity to compel the payment by stockholders of unpaid subscriptions: *Gilmore's Ex'rs* v. *Bank of Cincinnati*, 8 Ohio, 62; and in order

that other creditors of a corporation may participate in the benefits of a suit brought by one creditor to enforce the payment of a subscription to the capital stock, they must be guilty of no laches in asserting their rights and complying with the conditions imposed by the court as to participation: *Thompson* v. *Reno Sav. Bank*, 19 Nev. 291.

It has been asserted that a creditor of a corporation will be barred by the statute of limitations from proceeding against stockholders for unpaid subscriptions whenever the company itself would be barred: *South Carolina Mfg. Co.* v. *Bank of South Carolina*, 6 Rich. Eq. 227; but in *McGinnis* v. *Barnes*, 23 Mo. App. 413, it was held that when any part of the capital stock of a corporation remains unpaid in a stockholder's hands, he is a trustee thereof for the corporate creditors until their claims are satisfied; and the statute of limitations, as it affects the relations between stockholders and creditors, is to be considered, and not as it affects the relations between stockholders and corporation; consequently, although the statute may have run against the right of the corporation to enforce a stockholder's liability for unpaid subscriptions, — running, for instance, from the time of the dissolution of the corporation, — a creditor may have a subsisting cause of action against the stockholder, the statute running from the time his claim became due and payable. At all events, if stock is payable on call, as is usually the case, the statute of limitations does not run against the right of creditors to enforce payment of unpaid subscriptions until a valid call has been made by the directors of the corporation or by a court of competent jurisdiction, or at least some authorized demand has been made upon the share-holder, or perhaps, otherwise, until the corporation has notoriously ceased to be a going concern: Taylor on Corporations, sec. 709; Thompson's Liability of Stockholders, sec. 291; Cook on Stock and Stockholders, sec. 195; *Scovill* v. *Thayer*, 105 U. S. 143, 155; *Curry* v. *Woodward*, 53 Ala. 371; *Harmon* v. *Page*, 62 Cal. 448; *Glenn* v. *Saxton*, 68 Id. 353; *Glenn* v. *Williams*, 60 Md. 93; *Payne* v. *Bullard*, 23 Miss. 88; 55 Am. Dec. 74; *Thompson* v. *Reno Sav. Bank*, 19 Nev. 171; *post*, p. 881; *Allibone* v. *Hager*, 46 Pa. St. 48; *Glenn* v. *Dorsheimer*, 23 Fed. Rep. 695; 24 Id. 536; *Glenn* v. *Priest*, 28 Id. 907; compare *Hightower* v. *Thornton*, 8 Ga. 486, 502; 52 Am. Dec. 412, 424; *First National Bank* v. *Greene*, 64 Iowa, 445. A call made by a court of competent jurisdiction, as a court of chancery or of bankruptcy, has the same effect to set the statute in motion as if made by the officers of the corporation: *Glenn* v. *Saxton*, *Glenn* v. *Williams*, *Scovill* v. *Thayer*, *supra*. In *Glenn* v. *Dorsheimer* and *Glenn* v. *Priest*, *supra*, it was expressly held that where an insolvent corporation assigned all its property to trustees for the benefit of creditors, including unpaid stock subscriptions, and ceased to do business, the liability of the stockholders upon their subscriptions became absolute, and the statute of limitations began to run in their favor at once, or within a reasonable time thereafter, as against the creditors and assignees. *Dicta* in the following cases also support the view that the statute is set in motion by a notorious disbandonment of the company and cesser of business: *Curry* v. *Woodward*, *Harmon* v. *Page*, *Payne* v. *Bullard*, *supra;* see also *Mitchell* v. *Beckman*, 64 Cal. 117; but in *Glenn* v. *Semple*, 80 Ala. 159, 60 Am. Rep. 92, it was held that where a corporation, becoming embarrassed, executed a deed of assignment for the benefit of creditors, not having called in all the stock subscribed, the statute did not begin to run in favor of the stockholders from the date of the assignment, but from the time a decree is afterwards rendered by a court of equity making an assessment, Somerville, J., saying: "We cannot see that the cessation of business by the company, and

the assignment of its assets, can operate on any just principle to set in motion the running of the statute of limitations in favor of stockholders," criticising some remarks in *Curry* v. *Woodward*, *supra;* however, in this case, there seemed to have been no proof of a disbandonment: See Mr. Thompson's views on this question in Thompson's Liability of Stockholders, sec. 291.

See further, *post*, this note, for the questions concerning the statute of limitations in actions by creditors of corporations to enforce the statutory liability of stockholders for corporate debts.

MISCELLANEOUS DEFENSES IN SUIT AGAINST STOCKHOLDERS TO REACH UNPAID SUBSCRIPTIONS. — If calls were made and remained unpaid prior to the bankruptcy of a stockholder, undoubtedly they would be covered by his discharge in bankruptcy; but such discharge is no bar to an action for an installment subsequently called for, the unpaid and uncalled subscription not constituting such a debt or liability as is provable against his estate in bankruptcy: *Glenn* v. *Howard*, 65 Md. 40. As to whether or not the discharge of a stockholder in bankruptcy or insolvency will affect his statutory liability for corporate debts, see *post*.

A tender during the solvency of a corporation by a subscriber to its stock of the full amount of his subscription, and a demand for the issue of a certificate, which were refused without legal cause, it is held, extinguished the obligation to pay the subscription, as against the assignee of the corporation, when it afterwards became insolvent: *Potts* v. *Wallace*, 32 Fed. Rep. 272.

The mere change of the name of a corporation does not, of course, relieve a stockholder from liability for unpaid subscriptions: *Glenn* v. *Springs*, 26 Fed. Rep. 494; *Blackburn's Case*, 8 De Gex, M. & G. 177; Thompson's Liability of Stockholders, sec. 111.

WHO ARE STOCKHOLDERS, LIABLE TO CREDITORS FOR UNPAID SUBSCRIPTIONS. — Stockholders may become such either by original subscription, by direct purchase from the corporation, or by subsequent transfer from the original holders: See *Webster* v. *Upton*, 91 U. S. 65, 67, *per* Strong, J. The questions arise, When does the liability to creditors for unpaid subscriptions originally attach, and when does the liability cease, if at all, by subsequent transfer? or, in other words, Who are the stockholders to be held liable to creditors for the sums remaining unpaid on the stock? It is not proposed to here discuss the general questions relating to subscriptions to stock, which will be found treated in the note to *Parker* v. *Thomas*, 81 Am. Dec. 392, but to notice simply those rules which specially concern the subject in hand. It may be premised that stockholders are equally liable for unpaid subscriptions, whether they became such by original subscription or by subsequent transfer: *Ward* v. *Griswoldville Mfg. Co.*, 16 Conn. 593, 598; *Webster* v. *Upton*, 91 U. S. 65, 69. But plainly, to constitute one a subscriber, he must either subscribe himself or authorize some one to subscribe for him, or afterwards ratify the unauthorized subscription made in his name: *McClelland* v. *Whiteley*, 11 Biss. 444; 15 Fed. Rep. 322; but if one signs a subscription-book for stock in a contemplated corporation to induce others to subscribe, leaving the amount of his own subscription in blank, it is but fair to hold that, as to creditors of the company, he thereby impliedly authorizes those empowered to take subscriptions to fill up the blank, and when so done, such subscriber will be estopped from questioning their authority so to do: *Jewell* v. *Rock River Paper Co.*, 101 Ill. 57.

It is settled that an express promise to pay the unpaid balance is not necessary to render either the original holder or the subsequent transferee of the stock liable therefor: *Upton* v. *Tribilcock*, 91 U. S. 45; *Webster* v. *Upton*,

91 Id. 65, 69; *Sagory* v. *Dubois*, 3 Sand. Ch. 466; *Dayton* v. *Borst*, 31 N. Y. 435; *Merrimac Min. Co.* v. *Levy*, 54 Pa. St. 227; 93 Am. Dec. 697; with the exception of two or three New England States: See Cook on Stock and Stockholders, secs. 68, 69. "An express promise," says Strong, J., in *Webster* v. *Upton*, *supra*, "is almost unknown, except in the case of an original subscription; and oftener than otherwise it is not made in that. The subscriber merely agrees to take stock. He does not expressly promise to pay for it. Practically, then, unless the ownership of such stock carries with it the legal duty of paying all legitimate calls made during the continuance of the ownership, the fund held in trust for creditors is only that portion of each share which was paid prior to the organization of the company; in many cases not more than five per cent; in the present, only twenty." And again, he says: "If the law implies a promise by the original subscribers to pay the full par value when it may be called, it follows that an assignee of the stock, when he has come into privity with the company by having stock transferred to him on the company's books, is equally liable."

In general, "the acceptance and holding of a certificate of shares in an incorporation makes the holder liable to the responsibilities of a share-holder": *Upton* v. *Tribilcock*, 91 U. S. 45, 47; *Chubb* v. *Upton*, 95 Id. 665; *Sanger* v. *Upton*, 91 Id. 56; Thompson's Liability of Stockholders, sec. 105; but a certificate in favor of an original subscriber, or a new certificate in favor of the subsequent purchaser, is not necessary to render him liable for unpaid balances: *Hawley* v. *Upton*, 102 U. S. 314; *Upton* v. *Burnham*, 3 Biss. 431, 520; *Farrar* v. *Walker*, 3 Dill. 506, note; *Haskell* v. *Sells*, 14 Mo. App. 91; and see Cook on Stock and Stockholders, sec. 192; Thompson's Liability of Stockholders, sec. 106; note to *Franklin Glass Co.* v. *Alexander*, 9 Am. Dec. 96; note to *Freeland* v. *McCullough*, 43 Id. 697; and the same is true where one is sought to be held individually liable as a stockholder for the debts of a corporation, under statute: See *Mitchell* v. *Beckman*, 64 Cal. 117; *Corwith* v. *Culver*, 69 Ill. 502; *Chaffin* v. *Cummings*, 37 Me. 76, 83; *Hawes* v. *Anglo-Saxon Petroleum Co.*, 101 Mass. 385, 395; 111 Id. 200; *Schaefer* v. *Missouri Home Ins. Co.*, 46 Mo. 248; *Spear* v. *Crawford*, 14 Wend. 20; 28 Am. Dec. 513; *Burr* v. *Wilcox*, 22 N. Y. 551; *Wheeler* v. *Millar*, 90 Id. 353; *Keyser* v. *Hitz*, 2 Mackey, 473; and, of course, a subscriber's liability is unaffected by his failure to meet subsequent calls: *Haskell* v. *Sells*, *supra;* and to the same effect as regards statutory personal liability, see *Mitchell* v. *Beckman*, 64 Cal. 117; *Chaffin* v. *Cummings*, 37 Me. 76, 83; *Schaefer* v. *Missouri Home Ins. Co.*, 46 Mo. 248; *Spear* v. *Crawford*, 14 Wend. 20; 28 Am. Dec. 513; *Wheeler* v. *Millar*, 90 N. Y. 353; unless his stock has been forfeited therefor: See *supra*, "Withdrawal and Release of Stockholders, and Forfeiture of Stock as Affecting Liability for Unpaid Subscriptions"; note to *Franklin Glass Co.* v. *Alexander*, 9 Am. Dec. 96; note to *Freeland* v. *McCullough*, 43 Id. 699; nor is it material that he never participated in any of the business meetings of the corporation: *Haskell* v. *Sells*, *supra*.

A *bona fide* transfer of stock, perfected upon the books of the corporation, if required, discharges the transferrer from liability to the corporation and to its creditors, for installments and calls becoming due thereafter: *Allen* v. *Montgomery R. R.*, 11 Ala. 437; *Billings* v. *Robinson*, 94 N. Y. 415; *Gilmore's Ex'rs* v. *Bank of Cincinnati*, 8 Ohio, 62, 71; Cook on Stock and Stockholders, sec. 255; Thompson's Liability of Stockholders, sec. 210; Taylor on Corporations, secs. 747, 748; unless, of course, the charter or some general statute provides that they shall continue liable; but the liability of a subscriber will not be discharged by an informal *ex parte* transfer, not entered upon the books of the company,

nor recognized by it, although the transfer be in writing, and accompanied by a private agreement that the transferrer should not be liable for anything unpaid on the shares: *Bell's Appeal*, 115 Pa. St. 88; 2 Am. St. Rep. 532; and where neither the charter nor the by-laws of a corporation declared that its shares should be transferred only upon its books, but the certificate of stock provided that the shares should "be transferable only on the books of the association," it was held, in an action brought by the receiver of the company for unpaid subscriptions, that the liability of a stockholder continued until a transfer was made on the books, notwithstanding he had previously sold and delivered his certificate to another, who had drawn the dividends, but who had not had the stock transferred on the books to himself: *Cutting* v. *Damerel*, 23 Hun, 339. But it may here be remarked that the transfer of stock does not always relieve the transferrer from his statutory personal liability for the debts of the corporation: See *post*. The transfer must be in good faith. A stockholder is not permitted to make a transfer to an irresponsible person for the purpose of escaping liability for unpaid subscriptions: *Rider* v. *Morrison*, 54 Md. 429, 444; *Nathan* v. *Whitlock*, 9 Paige, 152; *Mandion* v. *Firemen's Ins. Co.*, 11 Rob. (La.) 177; note to *Freeland* v. *McCullough*, 43 Am. Dec. 699; note to *Germantown Passenger R'y* v. *Fitler*, 100 Id. 556; Cook on Stock and Stockholders, sec. 265; Thompson's Liability of Stockholders, secs. 211, 215; 2 Morawetz on Corporations, sec. 858; Taylor on Corporations, sec. 749; not even with the consent of the directors of the corporation: *Nathan* v. *Whitlock*, *supra*. "The capital stock, embracing both paid and unpaid subscriptions, is a trust fund for the benefit of creditors and share-holders, and it would be inconsistent with the nature of such a trust to permit subscribers to transfer their stock to insolvent persons, and thus escape liability for the payment of their subscription": *Rider* v. *Morrison*, *supra*. A like rule prevails in case of the statutory individual liability of stockholders for the debts of a corporation: See *Bowden* v. *Johnson*, 107 U. S. 251; *Bowden* v. *Santos*, 1 Hughes, 158; *Central Agricultural etc. Ass'n* v. *Alabama Gold L. Ins. Co.*, 70 Ala. 120; *Paine* v. *Stewart*, 33 Conn. 517; *Marcy* v. *Clark*, 17 Mass. 330; *McClaren* v. *Franciscus*, 43 Mo. 452; *Provident Savings Inst.* v. *Jackson Place Skating etc. Rink*, 52 Id. 557; *Veiller* v. *Brown*, 18 Hun, 571; *Aultman's Appeal*, 98 Pa. St. 505; *Dauchy* v. *Brown*, 24 Vt. 197; compare *Miller* v. *Great Republic Ins. Co.*, 50 Mo. 55; and see also the following cases, in which the transfer was taken in the name of an irresponsible person by the purchaser or subscriber for the purpose of avoiding statutory liability: *Davis* v. *Stevens*, 17 Blatchf. 259; *Case* v. *Small*, 4 Woods, 78; 10 Fed. Rep. 722; *Castleman* v. *Holmes*, 4 J. J. Marsh. 1; *Roman* v. *Fry*, 5 Id. 634; but see *Anderson* v. *Philadelphia Warehouse Co.*, 111 U. S. 479; *Mayruder* v. *Colston*, 44 Md. 349; *Holyoke Bank* v. *Burnham*, 11 Cush. 183. As to the effect of a transfer under the English companies' acts, see *Hyam's Case*, 1 De Gex, F. & J. 75; *Costello's Case*, 2 Id. 302; *Budd's Case*, 30 Beav. 143, affirmed in 3 De Gex, F. & J. 297; *Jessopp's Case*, 2 De Gex & J. 638; *De Pass's Case*, 4 Id. 544; *Chinnock's Case*, Johns. 714; *King's Case*, L. R. 6 Ch. 199; *Harrison's Case*, Id. 286; *Ex parte Kintea*, L. R. 5 Ch. 95; *Gilbert's Case*, Id. 559; *William's Case*, L. R. 1 Ch. D. 576.

As a stockholder is discharged from liability for future installments and calls by a valid transfer of his stock, in good faith, so his transferee becomes responsible for installments falling due and calls made while he retains the ownership of the stock: *Webster* v. *Upton*, 91 U. S. 65, 72; *Upton* v. *Hansbrough*, 3 Biss. 417; *Mann* v. *Currie*, 2 Barb. 294; *Merrimac Min. Co.* v. *Levy*, 54 Pa. St. 227; 93 Am. Dec. 697; *Bell's Appeal*, 115 Pa. St. 88; 2 Am. St. Rep. 532; *Lane's Appeal*, 105 Pa. St. 49, 61; Cook on Stock and Stock-

holders, sec. 256. The obligation to make good unpaid portions of the stock is an obligation which passes with the stock to a transferee, the original holder being relieved from further liability, unless, in exceptional instances, the original holder is, notwithstanding, liable by virtue of the charter or some general statutory provision. Thus where a statute provides that "on any assignment, the assignee and assignor shall each be liable for any installment which may have accrued, or which may thereafter accrue," while an assignment of the stock may operate a complete transfer of title as between assignor and assignee, it does not release the assignor from his liability as stockholder, but he remains liable, not only for past assessments, but for any future assessments upon the stock, though the assignee becomes liable also: *McKim* v. *Glenn*, 66 Md. 479; see also *Bell's Appeal*, *supra;* but where an act relating to the formation of corporations provided that "all sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder or person from whom the same is purchased, and subject such purchaser to the payment of any unpaid balance due or to become due on such stock; but if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser," the statute applies to such only as are, or have been, holders of the legal title to the stock: *Branson* v. *Oregonian R'y*, 10 Or. 278. If a corporation accepts as a stockholder one to whom stock has been transferred, by entering his name upon the books, whether he requested it to do so or not, or whether he ever assented thereto, he then becomes liable as a stockholder for the unpaid portion of the stock: *Upton* v. *Burnham*, 3 Biss. 520.

A creditor is entitled to hold him liable as a stockholder who appears to be the legal owner of the stock; and it may be that although a transfer has taken place, no change has been made upon the books of the corporation, so that the transferrer, and not the transferee, will be liable: See Thompson's Liability of Stockholders, sec. 178; 2 Morawetz on Corporations, sec. 852. On the same principle, one who stands upon the books of the corporation as a stockholder may be proceeded against for the recovery of any sum due upon the stock, although he in fact holds such stock as trustee for another: Thompson's Liability of Stockholders, sec. 179; 2 Morawetz on Corporations, sec. 852; *Mann* v. *Currie*, 2 Barb. 294; *McKim* v. *Glenn*, 66 Md. 479; *Grew* v. *Breed*, 10 Met. 569, 576; *Hoare's Case*, 2 Johns. & H. 229; *Bugg's Case*, 2 Drew. & S. 452; *William's Case*, L. R. 1 Ch. D. 576; *King's Case*, L. R. 6 Ch. 196; *Mitchell's Case*, L. R. 9 Eq. 196; *Chapman and Barker's Case*, L. R. 3 Eq. 361; or as collateral security for a debt of the transferrer: Thompson's Liability of Stockholders, sec. 223; 2 Morawetz on Corporations, sec. 852; Taylor on Corporations, sec. 740; *Pullman* v. *Upton*, 96 U. S. 328; and a like rule prevails in actions to enforce the personal liability of stockholders for the debts of a corporation under statutory provisions: See *National Bank* v. *Case*, 99 U. S. 628; *Bowden* v. *Farmers' etc. Bank*, 1 Hughes, 307; *Moore* v. *Jones*, 3 Woods, 53; *Wheelock* v. *Kost*, 77 Ill. 296; *Hale* v. *Walker*, 31 Iowa, 344; *Magruder* v. *Colston*, 44 Md. 349; *Crease* v. *Babcock*, 10 Met. 524, 545; *Grew* v. *Breed*, 10 Id. 569, 576; *Holyoke Bank* v. *Burnham*, 11 Cush. 183; *Johnson* v. *Somerville Dyeing Co.*, 15 Gray, 216; *First Nat. Bank* v. *Hingham Mfg. Co.*, 127 Mass. 563; *Erskine* v. *Loewenstein*, 82 Mo. 301, affirming 11 Mo. App. 595; *Adderly* v. *Storm*, 6 Hill, 624; *Rosevelt* v. *Brown*, 11 N. Y. 148; *In re Empire City Nat. Bank*, 18 Id. 119, 223; *Aultman's Appeal*, 98 Pa. St. 505. The books of the company are *prima facie* evidence of the ownership of stock in those whose names appear thereon as stockholders: Note to *Franklin Glass Co.* v. *Alexander*, 9 Am. Dec. 96; *Turnbull* v. *Payson*, 95 U. S.

418; *Glenn* v. *Springs*, 26 Fed. Rep. 494; Cook on Stock and Stockholders, sec. 73; Taylor on Corporations, sec. 740; but one who appears to be a stockholder upon the books may show that his name is there without right or authority: *Webster* v. *Upton*, 91 U. S. 65, 72. A similar ruling is made under charters and general statutes imposing a personal liability upon stockholders for the debts of the corporation: *Hoagland* v. *Bell*, 36 Barb. 57; *Thornton* v. *Lane*, 11 Ga. 459; but see *Mudgett* v. *Horrell*, 33 Cal. 25, which denies that the books are admissible in evidence at all; and *Stanley* v. *Stanley*, 26 Me. 191, which holds them to be conclusive.

POWERS OF ASSIGNEES FOR BENEFIT OF CREDITORS, OF ASSIGNEES IN BANKRUPTCY, AND OF RECEIVERS, WITH RESPECT TO UNPAID SUBSCRIPTIONS. — Unpaid subscriptions are assets which a corporation may assign like any other choses in action, and they will pass to the assignee under a general assignment for the benefit of creditors: Note to *Germantown Passenger R'y* v. *Fitler*, 100 Am. Dec. 556; 2 Morawetz on Corporations, sec. 819; *Schockley* v. *Fisher*, 75 Mo. 498; *Eppright* v. *Nickerson*, 78 Id. 482; *Franklin* v. *Menown*, 10 Mo. App. 570; 11 Id. 592; *Lionberger* v. *Broadway Savings Bank*, 10 Id. 499; *Haskell* v. *Sells*, 14 Id. 91; *Germantown Passenger R'y* v. *Fitler*, 60 Pa. St. 124; 100 Am. Dec. 546; *West Chester etc. R. R.* v. *Thomas*, 2 Phila. 344; who may maintain a bill in equity to recover them: *Lionberger* v. *Broadway Savings Bank*, *supra;* notwithstanding certain creditors of the corporation had proceeded by motion, under the statute, against the stockholders: Id.; and after the assignment creditors cannot proceed by motion: *Franklin* v. *Menown*, *supra*. A court of equity may make a call at his instance: See *Glenn* v. *Williams*, 60 Md. 93; which is binding and effective upon the stockholders who were not individually parties to the cause, but who were represented by the corporation: Id.; and which may be enforced by him in another state: Id.

Unpaid subscriptions also pass by a decree in bankruptcy or insolvency of the corporation to the assignee, who represents both corporation and creditors, and who alone can enforce the liability of the stockholders: Note to *Germantown Passenger R'y* v. *Fitler*, 100 Am. Dec. 553, 556; Thompson's Liability of Stockholders, sec. 341; *Payson* v. *Stoever*, 2 Dill. 427; *Lane* v. *Nickerson*, 99 Ill. 284; *Hurd* v. *Tallman*, 60 Barb. 272; *Gilmore* v. *Bank of Cincinnati*, 8 Ohio, 71; and as the corporation might have sued a stockholder at law for his unpaid and payable subscription, the assignee in bankruptcy, succeeding to its rights, has the same remedy: *Sanger* v. *Upton*, 91 U. S. 56. It is well settled that a court of bankruptcy has the same power as a court of equity to make an assessment upon the stockholders: 2 Morawetz on Corporations, sec. 822; *Sanger* v. *Upton*, 91 U. S. 56; *Turnbull* v. *Payson*, 95 Id. 418; *Payson* v. *Stoever*, 2 Dill. 427; *Wilbur* v. *Stockholders of Glen Iron Works*, 18 Nat. Bank. Reg. 178; 13 Phila. 479; notwithstanding a provision in the contract of subscription and in the stock certificates that the unpaid balance was to be paid on the call of the directors, "when ordered by a vote of the majority of the stockholders themselves": *Upton* v. *Hansbrough*, 3 Biss. 417; and the order of the court directing a payment is conclusive in a suit by the assignee to enforce it: *Sanger* v. *Upton*, 91 U. S. 56; *Webster* v. *Upton*, 91 Id. 65, 71; *Pullman* v. *Upton*, 96 Id. 328, 329; *Payson* v. *Stoever*, 2 Dill. 427; and it is not necessary that the stockholders should have received actual notice of the application for the order: Id.; *Upton* v. *Burnham*, 3 Biss. 520; *Upton* v. *Hansbrough*, 3 Id. 417.

If a receiver has been appointed, the suit to compel the stockholders to pay their unpaid subscriptions should be prosecuted in his name, unless some

sufficient cause is shown to the contrary: Thompson's Liability of Stockholders, sec. 340; Cook on Stock and Stockholders, sec. 208; 2 Morawetz on Corporations, sec. 867; Taylor on Corporations, 542; note to *Germantown Passenger R'y* v. *Fitler*, 100 Am. Dec. 533; *Hightower* v. *Thornton*, 8 Ga. 486; 52 Am. Dec. 412; *Rankine* v. *Elliott*, 16 N. Y. 377; *Cleveland Rolling Mill Co.* v. *Texas etc. R'y*, 27 Fed. Rep. 250. A court of chancery may make a call at his instance: *Glenn* v. *Soule*, 22 Id. 417. He may recover the balance unpaid on subscriptions without any previous call having been made by the corporation: *Winans* v. *McKean R. R. etc. Co.*, 6 Blatchf. 215; but to enable him to sue at law, a call or assessment by the corporation itself or some competent court is necessary: *Chandler* v. *Siddle*, 3 Dill. 477; *Glenn* v. *Soule*, 22 Fed. Rep. 417, 418; *Chandler* v. *Keith*, 42 Iowa, 99. The order is binding, although the stockholders are not made actual parties to the proceedings: *Glenn* v. *Soule*, *supra;* but see *Lamar Ins. Co.* v. *Hildreth*, 55 Iowa, 248. The receiver or assignee in bankruptcy of a foreign corporation may maintain an action against a resident stockholder, if the corporation itself could have maintained it had the stockholder been a citizen of the state in which it was domiciled: Thompson's Liability of Stockholders, sec. 81; Cook on Stock and Stockholders, sec. 208; *Dayton* v. *Borst*, 31 N. Y. 435; *Patterson* v. *Lynde*, 112 Ill. 196, 206.

It may be remarked in this connection that the statutory liability of stockholders is not an asset of the corporation, and therefore cannot be assigned by the corporation for the benefit of creditors: *Wright* v. *McCormack*, 17 Ohio St. 86; and for the same reason it cannot be enforced by the assignee in bankruptcy: *Dutcher* v. *Marine Nat. Bank*, 12 Blatchf. 435; *Bristol* v. *Sanford*, 12 Id. 341; or by the receiver: *Jacobson* v. *Allen*, 20 Id. 525; 12 Fed. Rep. 454; *Wincock* v. *Turpin*, 96 Ill. 135; *Mason* v. *New York Silk Mfg. Co.*, 27 Hun, 307; *Farnsworth* v. *Wood*, 91 N. Y. 308; unless the statute otherwise expressly provides: See *Walker* v. *Crain*, 17 Barb. 11; *Herkimer County Bank* v. *Furman*, 17 Id. 116, 119; *Story* v. *Furman*, 26 N. Y. 214.

STATUTORY LIABILITY OF STOCKHOLDERS TO CREDITORS FOR CORPORATE DEBTS. — The policy, so generally existing in America, of imposing a greater or different liability upon stockholders of corporations in favor of corporate creditors than that existing under the rules of equity for unpaid subscriptions has been very fruitful of litigation.

STOCKHOLDERS ARE NOT INDIVIDUALLY LIABLE AT COMMON LAW FOR DEBTS OF CORPORATION. — At the common law, it is well settled that the stockholders or members of a corporation are not individually liable for its debts: Note to *Freeland* v. *McCullough*, 43 Am. Dec. 694; note to *Prince* v. *Lynch*, 99 Id. 433; Cook on Stock and Stockholders, sec. 212; Thompson's Liability of Stockholders, sec. 4; Angell and Ames on Corporations, secs. 591, 595; Boone on Corporations, sec. 126; Field on Corporations, secs. 55-74; 2 Morawetz on Corporations, secs. 779, 869; Taylor on Corporations, sec. 700; *Smith* v. *Huckabee*, 53 Ala. 191, 193; *Jones* v. *Jarman*, 34 Ark. 323, 328; *French* v. *Teschemaker*, 24 Cal. 518, 540; *Green* v. *Beckman*, 59 Id. 545, 548; *Ward* v. *Grinvoldville Mfg. Co.*, 16 Conn. 593, 599; *Shaw* v. *Boylan*, 16 Ind. 384; *Hampson* v. *Weare*, 4 Iowa, 13, 15; *Adams* v. *Wiscasset Bank*, 1 Me. 361; 10 Am. Dec. 88; *Vose* v. *Grant*, 15 Mass. 505; *Spear* v. *Grant*, 16 Id. 9; *Trustees of Free Schools* v. *Flint*, 13 Met. 539, 541; *Gray* v. *Coffin*, 9 Cush. 192; *Erickson* v. *Nesmith*, 4 Allen, 233, 234; *Essex Co.* v. *Lawrence Machine Shop*, 10 Id. 352; *Inhabitants of Norton* v. *Hodges*, 100 Mass. 241; *Salt Lake City Nat. Bank* v. *Hendrickson*, 40 N. J. L. 52; *Freeland* v. *McCullough*, 1 Denio,

414, 422; 43 Am. Dec. 685, 688; *Seymour* v. *Sturgess*, 26 N. Y. 134; *Atwood* v. *Rhode Island Agricultural Bank*, 1 R. I. 376, 386; *Woods* v. *Wicks*, 7 Lea, 40, 45; *South Carolina Mfg. Co.* v. *Bank of South Carolina*, 6 Rich. Eq. 227; *Bird* v. *Calvert*, 22 S. C. 292, 296; *Walker* v. *Lewis*, 49 Tex. 123; *Dauchy* v. *Brown*, 24 Vt. 197; *Nimick* v. *Mingo Iron Works Co.*, 25 W. Va. 184, 199; *Terry* v. *Little*, 101 U. S. 216, 217; *United States* v. *Knox*, 102 Id. 422, 424; *Knower* v. *Haines*, 31 Fed. Rep. 513, 514. So far as this question is concerned, the corporation is an entity distinct from its members, and its debts are therefore not the debts of its members. The capital stock is the source of its credit; and when the share-holders have paid in the capital which they agreed to contribute, their liability ceases. It is true, as has been shown above, that unpaid subscriptions may be reached by the corporate creditors in equity; but such a proceeding is simply to reach assets of the corporation, and is in no sense enforcing a personal liability for its debts. Any individual liability of stockholders for the debts of the corporation must therefore in some way be specially imposed.

LIABILITY FOR DEBTS OF CORPORATIONS CAN BE IMPOSED UPON STOCKHOLDERS, AS SUCH, ONLY BY CONSTITUTIONS, CHARTERS, OR STATUTES. — Liability for the debts of a corporation cannot be imposed upon non-assenting stockholders or members by a mere by-law, in the absence of statute: Note to *Freeland* v. *McCullough*, 43 Am. Dec. 694; *Trustees of Free Schools* v. *Flint*, 13 Met. 539; *Reid* v. *Eatonton Mfg. Co.*, 40 Ga. 98; 2 Am. Rep. 563; nor by a resolution adopted by the governing body of a corporation: *Vincent* v. *Chapman*, 10 Gill & J. 279; nor does any personal liability attach to the stockholders of a bank by reason of the words "individual property of stockholders liable," appearing upon the face of bills issued by it: *Lowry* v. *Inman*, 46 N. Y. 119, 125; and the fact that a by-law purporting to impose an individual liability upon the stockholders has been printed and distributed to the public will not bind the stockholders as stockholders, although it might possibly as individuals: *Reid* v. *Eatonton Mfg. Co.*, *supra;* so, it seems, if members of a corporation sign a by-law which pledges them to be liable "in their individual as well as their collective capacity" for all moneys lent to the corporation, in order to enable the corporation to obtain a loan, and the by-law is used for that purpose, it gives a right of action against the signers in favor of one who was induced to advance money upon its credit: *Flint* v. *Pierce*, 99 Mass. 68, 71; and, it seems, that if the members of a corporation, finding it unable to pay all its debts, agree among themselves to contribute proportionally to their stock to make good the deficit, such agreement is binding upon them: *Ripley* v. *Sampson*, 10 Pick. 371, 373; but an oral promise of a member of a corporation to pay its debts, being within the statute of frauds, will not bind him: *Trustees of Free Schools* v. *Flint*, 13 Met. 539; and where money was loaned to a corporation on its bond and mortgage, and the stockholders became, by contract, sureties for the repayment of the loan, other creditors of the company have no equity to compel the lender to exhaust his remedy against the sureties before resorting to the company for payment: *South Carolina Mfg. Co.* v. *Bank of South Carolina*, 6 Rich. Eq. 227. While, therefore, a stockholder may so act towards creditors of a corporation, by means of a by-law or otherwise, as to be estopped from denying an individual liability to the creditors who have relied thereon, and while he may become a surety for the corporation, he is not, properly speaking, liable as a stockholder in such cases, but as an individual. And as the liability for the debts of a corporation did not rest upon its stockholders or members at the common law, and could not be imposed upon them

as such by a by-law of the company, it follows that the liability can only arise by virtue of constitutional provisions, special charters, general acts of incorporation, or other statutes. Sometimes the liability is imposed in one of these ways, sometimes in another.

See further, as to the constitutionality of statutes imposing a liability upon stockholders for corporate debts, *post*, "Legislative Power to Impose, Repeal, or Modify Statutory Liability of Stockholders for Corporate Debts."

STATUTES IMPOSING LIABILITY, WHETHER STRICTLY OR LIBERALLY CONSTRUED. — Whether the provision of a charter or other statute which imposes a personal liability upon the stockholders of a corporation for the payment of its debts is to be strictly or liberally construed, is a question upon which the cases are not agreed. It is held by one line of cases that such provisions are remedial, and therefore should be liberally construed: *Freeland* v. *McCullough*, 1 Denio, 412; 43 Am. Dec. 685; *Marion Township etc. Draining Co.* v. *Norris*, 37 Ind. 424, 429; *Gauch* v. *Harrison*, 12 Ill. App. 457, 461; compare *Carver* v. *Braintree Mfg. Co.*, 2 Story, 432; but another line of cases maintains that, being in derogation of the common law, such provisions should be strictly construed: *Gray* v. *Coffin*, 9 Cush. 192; *Dane* v. *Dane Mfg. Co.*, 14 Gray, 488, 489; *Potter* v. *Stevens Machine Co.*, 127 Mass. 592; *Moyer* v. *Pennsylvania State Co.*, 71 Pa. St. 293, 297; *Appeal of Means*, 85 Id. 75, 78; *O'Reilly* v. *Bard*, 105 Id. 569, 573; *Salt Lake City Nat. Bank* v. *Hendrickson*, 40 N. J. L. 52; *Nimick* v. *Mingo Iron Works Co.*, 25 W. Va. 184, 199; and see *Chase* v. *Lord*, 77 N. Y. 1; 6 Abb. N. C. 258; while still another holds that a reasonable or sensible construction is to be adopted: *Carver* v. *Braintree Mfg. Co.*, 2 Story, 432, 447; *Mokelumne Hill etc. Co.* v. *Woodbury*, 14 Cal. 265, 266; *Bohn* v. *Brown*, 33 Mich. 257; *Lane* v. *Morris*, 8 Ga. 475; *Ingalls* v. *Cole*, 47 Me. 540; and see also *Dewey* v. *St. Albans Trust Co.*, 57 Vt. 332; *Weigley* v. *Coal Oil Co.*, 5 Phila. 67; and this latter is the preferable doctrine; for, "in construing a statutory provision imposing individual liability upon the members of a corporation, it is the duty of the courts to ascertain and carry out the intention of the legislature. To lay down any arbitrary rule for the construction of a particular class of statutes is manifestly contrary to reason, and can only lead to error and perversion of justice": 2 Morawetz on Corporations, sec. 880; and see, favoring this view, Thompson's Liability of Stockholders, sec. 52; note to *Freeland* v. *McCullough*, 43 Am. Dec. 696; *contra*, Cook on Stock and Stockholders, sec. 214. This class of statutes should be here carefully distinguished from another class, which impose a personal liability for the debts of the corporation upon trustees or other officers, and sometimes upon stockholders, because of the failure to conform to some special requirement; such statutes, being penal, are held to require a strict construction: *Esmond* v. *Bullard*, 16 Hun, 65; *Cady* v. *Smith*, 12 Neb. 628, 630; *Cable* v. *McCune*, 26 Mo. 371. "But even here," says Mr. Thompson, "it is believed that the rule, properly understood, and applied so as not to transcend the scope of judicial power, goes no further than to hold that, where the statute is penal, courts will hesitate more about enlarging the meaning of doubtful terms than where it is remedial": Thompson's Liability of Stockholders, sec. 54.

EXTENT, IN GENERAL, OF INDIVIDUAL LIABILITY FOR DEBTS OF CORPORATION. — The extent of the liability imposed upon stockholders for corporate debts varies greatly with the different constitutional provisions, special charters, general acts of incorporation, and other statutes.

Constitutional Provisions, and Legislation thereunder. — If a constitution provides for the individual liability of stockholders for corporate debts, ques-

tions may arise as to whether or not the provision is self-executory, and as to the extent of the legislative powers under it. These questions must be determined by the language of the provision itself. Thus a section of a constitution which says that "each stockholder of a corporation shall be individually and personally liable for his proportion of all its debts and liabilities" is not self-executing, but legislation is necessary to give it a reasonable and practical operation: *French* v. *Teschemaker*, 24 Cal. 518; see also *Morley* v. *Thayer*, 3 Fed. Rep. 737; compare *Peck* v. *Miller*, 39 Mich. 594; but, on the other hand, a section which reads, "each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock," is self-executing to the extent of the minimum liability prescribed by it: *Jones* v. *Jarman*, 34 Ark. 323. It results that, if a constitution provides that the stockholders shall be individually liable for the corporate debts, but does not fix the extent of the liability or provide means of enforcing it, it is competent for the legislature to determine how far stockholders shall be liable, and in what manner the liability shall be enforced: *French* v. *Teschemaker*, 24 Cal. 518; *Larrabee* v. *Baldwin*, 35 Id. 155; *Diversey* v. *Smith*, 103 Ill. 378, 385; *Hampson* v. *Weare*, 4 Iowa, 13; *Milroy* v. *Spurr Mountain Iron Min. Co.*, 43 Mich. 231; compare *Peck* v. *Miller*, 39 Id. 594; for instance, if it is said, as above, that each stockholder of a corporation shall be individually liable "for his proportion of all its debts and liabilities," the legislature may make each stockholder liable for his share of all the debts of the corporation contracted while he was a stockholder: *Larrabee* v. *Baldwin*, *supra;* and if the provision is to the effect that the stockholders "shall be subject to such liabilities and restrictions as shall be provided by law," the legislature may enact that when no corporate property can be found on which to levy execution, the acting manager or a member of the corporation may be notified to show cause why the individual property of the members should not be made liable: *Hampson* v. *Weare*, *supra;* and under such a provision, every stockholder takes his stock subject to be affected by whatever legislation in that regard the legislature may deem necessary; and therefore statutes imposing a personal liability upon stockholders for future corporate debts are free from constitutional objections: *Weidinger* v. *Spruance*, 101 Ill. 278; *Shufeldt* v. *Carver*, 8 Ill. App. 545, 548; but while the legislature can thus provide for the liability under such constitutional provisions, a statute which attempts to relieve stockholders from liability would plainly be void: *Central Agricultural etc. Ass'n* v. *Alabama Gold L. Ins. Co.*, 70 Ala. 120; *French* v. *Teschemaker*, 24 Cal. 518, 544, 553; *Milroy* v. *Spurr Mountain Iron Min. Co.*, 43 Mich. 231. Besides such questions as the foregoing, a further question as to the meaning of the constitutional provision may arise. Thus where it is provided that "in no case shall any stockholder be individually liable in any amount over and above the amount of the stock owned by him or her," a stockholder is not liable for a debt of the corporation, it is held, when his stock is fully paid up: *Schricker* v. *Ridings*, 65 Mo. 208; *Gausen* v. *Buck*, 68 Id. 545; but compare the cases, *post*, this head, under similar statutory provisions; but where it is said that "the stockholders of all corporations and joint-stock associations shall be individually liable for all labor performed for such corporation or association," the individual liability under the section means a liability beyond that of members of the corporation: *Milroy* v. *Spurr Mountain Iron Min. Co.*, 43 Mich. 231.

Liability to Extent of Unpaid Subscriptions. — As before stated, the extent of the liability imposed upon stockholders for the debts of corporations varies

greatly. In some instances, constitutions and statutes provide that the stockholders shall be liable to the creditors of the company to the amount unpaid on their stock; and when this is the case, it is obvious that no new right or liability is created, but simply an old one preserved: *Patterson* v. *Lynde*, 106 U. S. 519; 112 Ill. 196, 204, 207; *Bush* v. *Cartwright*, 7 Or. 329; *Brundage* v. *Monumental G. & S. Min. Co.*, 12 Id. 322; *Mills* v. *Stewart*, 41 N. Y. 384, 389; *Stephens* v. *Fox*, 83 Id. 313. A simple and less expensive remedy to enforce this pre-existing liability than that given in courts of equity, independent of the statute, may be the result: See *Mills* v. *Stewart*, *Stephens* v. *Fox*, *supra;* but, otherwise, one must proceed in equity, it is held, in the usual manner, to compel the payment of the unpaid subscriptions: *Patterson* v. *Lynde*, *Bush* v. *Cartwright*, *Brundage* v. *Monumental G. & S. Min. Co.*, *supra;* but see *Hodges* v. *Silver Hill Min. Co.*, 9 Or. 200, 204. Under such a provision, a question may occur as to whether or not, in particular instances, anything remains unpaid; or, in other words, in what manner may payments of stock subscriptions be made: See *Boynton* v. *Hatch*, 47 N. Y. 225; *Schenck* v. *Andrews*, 57 Id. 133; *Boynton* v. *Andrews*, 63 Id. 93; *Douglass* v. *Ireland*, 73 Id. 100. This question must be answered upon the general principles heretofore discussed in connection with the right of creditors of corporations to compel the payments of unpaid subscriptions: See *supra*, "Payment of Shares, how Made."

Unlimited Liability. — Sometimes a general liability for all the debts of the corporation is imposed. Thus where an act under which a corporation was formed provided that the stockholders "shall be jointly and severally liable in their individual capacities and estates for all debts, contracts, or other liabilities of the said company, contracted or incurred during the time such stockholders, respectively, own their stock, or are beneficially interested therein," the stockholders are liable for all debts contracted while they were stockholders, although they had paid up all their stock: *Patterson* v. *Wyomissing Mfg. Co.*, 40 Pa. St. 117; see also, in this connection, *Marsh* v. *Burroughs*, 1 Woods, 403; and where, by the Revised Statutes of New Hampshire, a creditor of a corporation could recover his whole debt from any one or more of the stockholders, who were to seek contribution from the others, but, by an amendment, proceedings against stockholders was required to be by bill in chancery, in such a proceeding an equitable contribution is to be made by the court between all the stockholders, as far as may be: *Erickson* v. *Nesmith*, 46 N. H. 371.

Liability Limited to "Extent" or "Amount" of Stock. — Generally, however, a limited liability only for the corporate debts is imposed upon stockholders. Under one statutory form, a liability for the debts of the corporation upon stockholders to the "extent" or "amount" "of their stock" is provided for; and this is interpreted to mean a liability to the extent of the nominal or face value of the stock, without reference to the amount that may have been paid in thereon: *Briggs* v. *Penniman*, 8 Cow. 387; 18 Am. Dec. 454; *In re Empire City Bank*, 18 N. Y. 119, 218; *Sackett's Harbour Bank* v. *Blake*, 3 Rich. Eq. 225; *Root* v. *Sinnock*, 120 Ill. 350; 60 Am. Rep. 558; *Pettibone* v. *McGraw*, 6 Mich. 441; *contra*, *Lewis* v. *St. Charles County*, 13 Mo. App. 48, overruling, 5 Id. 225, and holding that the payment to the corporation of the full amount of a stockholder's subscription was a complete defense to an action against him by a corporate creditor; and see *Schricker* v. *Ridings*, 65 Mo. 208; *Gausen* v. *Buck*, 68 Id. 545. In Ohio the constitution provides that "in all cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal

in amount to such stock"; and under this it was held, in *Aultman's Appeal*, 98 Pa. St. 505, that the liability not only existed in respect of stock subscribed for, but also in respect of stock distributed as a stock dividend, notwithstanding the statute under which a corporation was organized used the word "subscribed" instead of "owned," in a section providing for individual liability. Under this form, by which stockholders are made liable to the extent or amount of their stock for the debts of a corporation, each stockholder, to the extent of his stock, is liable for the entire corporate indebtedness: *Wehrman* v. *Realtirt*, 1 Cin. Sup. Ct. 230; although as between the stockholders there is an equity to have a contribution in proportion to the amount of stock owned by each: Id.; but the payment of a judgment recovered by a creditor of the corporation against him for an amount equal to the amount of stock held by him extinguishes his liability: *Buchanan* v. *Meisser*, 105 Ill. 638; *Thebus* v. *Smiley*, 110 Id. 316; *Woodruff etc. Iron Works* v. *Chittenden*, 4 Bosw. 406; *Mathes* v. *Neidig*, 72 N. Y. 100; and the same is true of a judgment confessed for such amount by a stockholder in favor of a *bona fide* creditor of the corporation: *Manvill* v. *Roever*, 11 Mo. App. 317; or of a voluntary payment to a creditor: *Buchanan* v. *Meisser*, *supra*; *Mathes* v. *Neidig*, *supra*; *Garrison* v. *Howe*, 17 N. Y. 458; and therefore where a stockholder's liability is thus discharged, one to whom he transfers his stock will take it freed from further liability: *Thebus* v. *Smiley*, *supra*; but it is held the payment by a stockholder of a sum equal to the amount of his stock to the firm of which he is a member, in satisfaction of a debt due from the corporation to the firm, will not release him from liability, since the firm could not maintain an action at law against him: *Buchanan* v. *Meisser*, *supra*; nor can a stockholder discharge himself by buying up debts owing by the corporation, equal to the amount of his liability, at a discount: *Thompson* v. *Meisser*, 108 Ill. 359; so where, before judgment was obtained against a stockholder, in an action against him by a creditor of an insolvent bank, the stockholder agreed with a friend that if the latter would buy up claims against the bank to the amount of the defendant's liability, the defendant would confess judgment, which understanding was carried out by the purchase of claims at a discount, and such judgment satisfied. the judgment and satisfaction cannot be pleaded in bar to the action: *Manville* v. *Karst*, 5 McCrary, 142; 16 Fed. Rep. 173. As to a stockholder's right to set off a debt due him by the corporation, in an action by a creditor, see *post*. If a stockholder, by his laches, permits several claims against the corporation, in excess of his liability as a stockholder, to ripen into judgments against him, he cannot require the judgment creditors to interplead concerning the rights which they have of enforcing their judgments: *Hodgson* v. *Cheever*, 9 Mo. App. 565.

Liability Limited "in Proportion" to Amount of Stock. — Under another statutory form, the stockholders are made liable for the debts of the corporation "in proportion" to the amount of their stock. Thus where the charter of a banking corporation provided that the stockholders should be personally liable "in proportion to the amount of shares and the value thereof," held by them "for the ultimate redemption of its bills or notes," a stockholder is plainly not liable for the ultimate redemption of all the bills and notes of the corporation, but for a part only, bearing the same proportion to the aggregate amount of unredeemed paper that his stock does to the entire capital stock of the corporation: *Adkins* v. *Thornton*, 19 Ga. 325, 328; *Branch* v. *Baker*, 53 Id. 502, 512; the liability of each stockholder is, therefore, to be ascertained and fixed by the following proportion: as the whole capital stock is to the entire outstanding circulation, so is each stockholder's shares to his

part to be redeemed: *Robinson* v. *Lane*, 19 Ga. 337. But where it is provided that "each stockholder of the company shall be individually and personally liable for such proportion of all its debts and liabilities as the amount of its capital stock owned by him bears to the whole of the capital stock," it is then only necessary, in an action by a creditor of a corporation against a stockholder, to ascertain the whole amount of the capital stock of the company, the amount owned by the stockholder, and the amount of indebtedness of the company to the creditor suing: *Morrow* v. *Superior Court*, 64 Cal. 383. In such cases as the above, the value of the stock is to be estimated according to the valuation placed upon it by the charter: *Lane* v. *Morris*, 10 Ga. 162; and where, as in the Georgia cases, the amount of outstanding indebtedness is a necessary element in ascertaining a stockholder's liability, any legitimate evidence should be received in fixing the fact: *Robinson* v. *Lane*, 19 Id. 337. The liability is a several one, and therefore one stockholder is not bound to make good an insolvent stockholder's portion: *Adkins* v. *Thornton*, 19 Id. 325, 328; *Crease* v. *Babcock*, 10 Met. 524, 557, 568; see also *United States* v. *Knox*, 102 U. S. 422, 425; and the liability is not increased by the fact that the corporation is to a considerable extent the owner of its own stock: *Crease* v. *Babcock*, 10 Met. 524, 555; see also *United States* v. *Knox*, 102 U. S. 422, 425. But any creditor whose demand is sufficient may collect from any stockholder the entire amount of the latter's liability, and thereupon the stockholder's liability to other creditors ceases: *Larrabee* v. *Baldwin*, 35 Cal. 155; *Lane* v. *Harris*, 16 Ga. 217; but compare Cal. Civ. Code, sec. 322; and see *Morrow* v. *Superior Court*, *supra;* so if a stockholder has otherwise paid his proportion of the outstanding indebtedness to one creditor, he is discharged from liability to the other creditors: *Belcher* v. *Wilcox*, 40 Ga. 391; *Jones* v. *Wiltberger*, 42 Id. 575; *Branch* v. *Baker*, 53 Id. 502, 512; and if he has paid less than the whole amount of his liability, it will be a good defense *pro tanto: Belcher* v. *Wilcox*, *Branch* v. *Baker*, *supra*; but after suit has been commenced against him by one creditor, he cannot defeat it by paying other creditors, even though he pay the full amount of his liability: *Jones* v. *Wiltberger*, *supra*. "Whatever satisfies or extinguishes the debt as to the corporation, extinguishes also the liability of the stockholders, because the creditor can claim only one satisfaction of the debt": *Young* v. *Rosenbaum*, 39 Cal. 646, 654; *San José Savings Bank* v. *Pharis*, 58 Id. 380. Therefore, where the debt has been partly satisfied by a forced sale of property pledged and mortgaged by the corporation, a stockholder is liable only for his proportion of the indebtedness remaining: *San José Savings Bank* v. *Pharis*, *supra*. But the fact that holders of unpaid stock of a banking corporation have severally redeemed their shares of the bills of the bank, under the charter which provides that the persons and property of the stockholders should be liable for the redemption of the bills and notes of the bank, in proportion to the number of shares which they hold, does not release them from liability for the amounts due on their stock subscriptions: *Marsh* v. *Burroughs*, 1 Woods, 463.

Liability Contingent on Certain Fact or Event. — Sometimes the stockholders are made absolutely liable to the "extent" or "amount" of their stock, or "in proportion" to the amount of their stock; but sometimes it is provided that they shall be so liable simply "until the whole amount of the capital stock shall have been paid in," or that they shall be liable in the event or contingency of a "dissolution," "failure," and the like. The foregoing general principles apply to such cases; but some special questions have arisen. If stockholders are made liable to the amount of their stock until the whole

amount of the capital stock shall have been paid in, the liability plainly depends upon whether or not the capital stock has all been paid up. If it has not been so paid, a stockholder is liable to the full amount of his shares, notwithstanding he may himself have fully paid up his stock: *Butler* v. *Walker*, 80 Ill. 345; *Tibballs* v. *Libby*, 87 Id. 142; and his liability is in no way affected by the amount of capital that at any time may remain unpaid: *Norris* v. *Johnson*, 34 Md. 485; *Norris* v. *Wrenschall*, 34 Id. 492; but the liability ceases when the whole amount of capital is paid in, and is consequently ended when so paid after the commencement of the action and before trial: *Booth* v. *Campbell*, 37 Id. 522. Generally, where the liability thus depends upon the payment of the whole amount of the capital stock, a certificate is also required to be made and recorded. And it is held that the certificate made and recorded as prescribed is conclusive evidence, for the stockholders, of the facts therein stated, so far as to exempt them from personal liability for the subsequent debts of the company: *Stedman* v. *Eveleth*, 6 Met. 114. Where a statute makes the stockholders liable for all debts due from the corporation at the time of its dissolution, it does contemplate a dissolution only as at common law, but a practical dissolution, which occurs "whenever the corporation becomes a nominal, inert body, its property and funds gone, and it is reduced to insolvency, rendering legal remedies against it fruitless and unavailing": *Central Agricultural etc. Ass'n* v. *Gold L. Ins. Co.*, 70 Ala. 120; so a suspension of specie payments by a banking corporation, and a refusal to pay specie generally, when demanded, is a "failure" within the meaning of its charter making the stockholders liable in the event of a failure: *Lane* v. *Morris*, 8 Ga. 468, 476; although the bank continued banking operations for some years after the suspension of specie payments: *Terry* v. *Calnan*, 13 S. C. 220; and where the charter of a bank provided that the individual property of the stockholders should be bound for the ultimate redemption of its bills, in proportion to the number of shares held by them respectively, the liability arises when the bank refuses or ceases to redeem, and is notoriously and continuously insolvent: *Terry* v. *Tubman*, 92 U. S. 156; *Terry* v. *Anderson*, 95 Id. 628, 632. If the charter of an insurance company provides that "in all cases of losses exceeding the means of the corporation, each stockholder shall be held liable to the amount of unpaid stock held by him," it is necessary, in an action brought against a stockholder, that the declaration should aver that the losses of the company, or its liabilities, exceed its assets: *Blair* v. *Gray*, 104 Id. 769.

Liability under National Banking Act. — The act of Congress of 1864 provides that the share-holders of a national bank shall be "individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Under this act, it is further left to the comptroller of the currency to determine when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and the extent to which the liability shall be enforced, and his order is conclusive upon the stockholders: *Kennedy* v. *Gibson*, 8 Wall. 498; *Casey* v. *Galli*, 94 U. S. 673; *National Bank* v. *Case*, 99 Id. 628; *Bailey* v. *Sawyer*, 4 Dill. 463. Creditors of an insolvent national bank cannot proceed, under this act of 1864, directly in their own names against the stockholders. The receiver appointed by the comptroller is the proper party to institute all suits, and it is not necessary to make either the bank or the creditors parties to the action: *Kennedy* v. *Gibson*, *supra*. But under the amendatory act of 1876, the authority of

the comptroller to appoint a receiver to wind up the affairs of a bank, after a receiver has been appointed by the court, and steps taken under a creditor's bill to enforce the share-holders' liability, as permitted by the amendment, is doubtful: *Harvey* v. *Lord*, 11 Biss. 144; 10 Fed. Rep. 236. The method of adjusting the liability of the stockholders was given as follows in *United States* v. *Knox*, 102 U. S. 422, 425, by Mr. Justice Swayne: "In the process to be pursued to fix the amount of the separate liability of each of the share-holders, it is necessary to ascertain: 1. The whole amount of the par value of all the stock held by all the share-holders; 2. The amount of the deficit to be paid after exhausting all the assets of the bank; 3. Then to apply the rule that each share-holder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value. There is a limitation of this liability. It cannot in the aggregate exceed the entire amount of the par value of all the stock. The insolvency of one stockholder, or his being beyond the jurisdiction of the court, does not in any wise affect the liability of another; and if the bank itself, in such case, holds any of its stock, it is regarded in all respects as if such stock were in the hands of a natural person, and the extent of the individual liability of the other stockholders is computed accordingly." Compare *Crease* v. *Babcock*, 10 Met. 524, 555; *Adkins* v. *Thornton*, 19 Ga. 325, 328.

Liability for Debts Due Laborers and Servants, and for Other Special Debts. — Sometimes a special statutory liability is imposed upon the stockholders of a corporation for debts due its "laborers" and "servants." The general meaning of these words is well indicated in the following quotations: "The word 'laborer' in the statute must probably be restricted to mean manual work; but 'servant' cannot be confined to a mere menial service. 'Laborer' is more distinctive than 'servant,' and embraces a smaller class; the former comprehending such only as perform labor with their hands, while the latter includes also such as do menial services": *Hovey* v. *Ten Broeck*, 3 Robt. 316, 320. "That term [servant] is one in general use. In common parlance it is understood to relate and apply only to a person rendering service of a subordinate, but not necessarily of a menial, character to an employer, varying in its nature according to the business or occupation in which it is rendered, and not to extend to and include every employee or party who does work for another. The context in which it is used, in the section referred to, being associated with 'laborers' and 'apprentices,' indicates that it was intended to apply to a person employed to devote his time and render his service in the performance of work similar in its general character to that done by those employees": *Hill* v. *Spencer*, 61 N. Y. 274, 278, *per* Lott, Ch. C. In accordance with these principles, a contractor for the construction of a part of a railroad, or who contracts for and furnishes the labor and services of others, or of teams, is not a laborer or servant: *Aikin* v. *Wasson*, 24 Id. 482; *Balch* v. *New York etc. R. R.*, 46 Id. 521; *Peck* v. *Miller*, 39 Mich. 594; *Taylor* v. *Mainwaring*, 48 Id. 171; nor is a general mining agent or superintendent: *Hill* v. *Spencer*, 61 Id. 274; *Dean* v. *De Wolf*, 16 Hun, 186; *Krauser* v. *Ruckel*, 17 Id. 463; compare *Sleeper* v. *Goodwin*, 67 Wis. 577; nor a book-keeper and general manager: *Wakefield* v. *Fargo*, 90 N. Y. 213; nor the secretary of a corporation: *Coffin* v. *Reynolds*, 37 Id. 640; *Viele* v. *Wells*, 9 Abb. N. C. 277; *contra*, *Richardson* v. *Abendroth*, 43 Barb. 162; although he also acted as book-keeper: *Viele* v. *Wells*, *supra;* nor is a consulting engineer: *Ericsson* v. *Brown*, 38 Barb. 390; nor an assistant chief engineer: *Brockway* v. *Innes*, 39 Mich. 47; 33 Am. Rep. 348; but a civil engineer and a rodman

are servants: *Conant* v. *Van Schaick*, 24 Barb. 87; so is a civil engineer and traveling agent employed at a fixed salary: *Williamson* v. *Wadsworth*, 49 Id. 294; and one who acts as a sort of engineer and a sort of foreman, showing the men how to work and working with them, and during the absence of the superintendent, acting in the latter capacity: *Vincent* v. *Bamford*, 42 How. Pr. 109; 12 Abb. Pr., N. S., 252; 1 Jones & S. 506; so one is both a laborer and a servant, where he acts as a book-keeper and overseer, working also with the men, although employed at a yearly salary: *Hovey* v. *Ten Broeck*, 3 Robt. 316; so also is one who, for a yearly salary, payable monthly, or as he wanted his pay, acted as foreman, took part in the manual labor, kept the time of the men, solicited orders, collected bills, and did whatever was required of him: *Short* v. *Medberry*, 29 Hun, 39; and a superintendent or foreman, though he performs no manual labor, was held to be a servant within the meaning of a statute which makes stockholders personally liable for all debts which may be due and owing "clerks, servants, and laborers": *Sleeper* v. *Goodwin*, 67 Wis. 577; but a traveling salesman is not a "laborer" within the meaning of a provision that stockholders shall be individually liable "for all labor performed" for the corporation: *Peck* v. *Miller*, 39 Mich. 594; and a corporation aggregate cannot be an employee of another corporation within the meaning of a statute which provides that stockholders shall be individually liable for all debts due and owing "laborers, servants, apprentices, and employees": *Dukes* v. *Love*, 97 Ind. 341. The question is one of construction and interpretation. Where an act under which a corporation was formed provided that the stockholders should be liable for all the debts due and owing laborers and servants, after an execution returned unsatisfied, to the amount due on such execution, in an action by a judgment creditor of the corporation to enforce the personal liability of a stockholder, the mere proof that a judgment was obtained against the company, and an execution returned unsatisfied is not enough; the plaintiff must also prove that the debt for which judgment was recovered was of the sort named in the statute: *Conant* v. *Van Schaick*, 24 Barb. 87; and where an act provided that the stockholders should be liable for debts due and owing laborers, servants, and apprentices for services performed for the corporation, but that they should only be liable for debts contracted by the company, "which are to be paid within one year from the time the debt is contracted, and on which a suit is brought against the company within one year after the debt becomes due," a stockholder is liable for the salary or wages of a servant or laborer, payable by the year, for which a suit is brought against the company within a year after the same became due, although the employment was to continue indefinitely: *Hovey* v. *Ten Broeck*, 3 Robt. 316. The right of action given to laborers and servants by the foregoing statutes is not a personal privilege given to them alone, but may be assigned: *Krauser* v. *Ruckel*, 17 Hun, 463.

In some instances, a somewhat different liability from the above is imposed; as where the act under which a corporation was formed provided that the stockholders "shall hereafter be jointly and severally liable in their individual capacities only for debts due to miners, quarrymen, and other laborers employed by such companies, and for machinery, provisions, merchandise, country produce, and materials furnished for said companies"; under which it was held that the act contemplated an ordinary sale and delivery to the company in the course of its usual business: *Weiss* v. *Mauch Chunk Iron Co.*, 58 Pa. St. 295; and that the liability of a stockholder did not extend to the case of a promissory note held by a third person, although given for materials used by the company in manufacturing: *Weighley* v. *Coal Oil Co.*, 5

Phila. 67; but where a merchant, upon orders of a corporation, furnished merchandise to its employees, and, by arrangement, the company took up the orders monthly by giving its notes, such transaction is within the act: *Reading Industrial Mfg. Co. v. Graeff*, 64 Pa. St. 395. A similar charter provision to the foregoing was held, by a very strict construction, not to include hauling with one's own team, repairing wagons used by the company, lumber for erecting machinery, feed for horses of the company, powder and fuse for blasting, and tools: *Moyer* v. *Pennsylvania Slate Co.*, 72 Pa. St. 293.

(*What are "Debts" for Which Stockholders are Liable*)—In determining for what obligations of a corporation the stockholders are made individually responsible, it is the duty of the courts, as in other cases, to ascertain the intention of the legislature, and then, if possible, to carry out such intention. It is competent for the law-making power to impose a liability upon stockholders for the torts as well as the contracts of a corporation, and if this be the intent, effect should be given it in the one case as much as in the other. Charters and statutes, however, provide that stockholders shall be liable for the "debts," or "debts and contracts," or "debts contracted," by the corporation; and the generally accepted doctrine is, that such expressions refer to obligations incurred by the corporation *ex contractu*, and not to liabilities for torts committed by the company's agents or servants: 2 Morawetz on Corporations, sec. 880; Taylor on Corporations, sec. 734; Thompson's Liability of Stockholders, secs. 57, 58; note to *Prince* v. *Lynch*, 99 Am. Dec. 435; *Propr's of Mill Dam Foundry Co.* v. *Hovey*, 21 Pick. 417; *Child* v. *Boston etc. Iron Works*, 137 Mass. 516; 50 Am. Rep. 328; *Heacock* v. *Sherman*, 14 Wend. 58; *Doolittle* v. *Marsh*, 11 Neb. 243; *Bohn* v. *Brown*, 33 Mich. 257; *Cable* v. *McCune*, 26 Mo. 371; 72 Am. Dec. 214; and see *Cable* v. *Gaty*, 34 Mo. 573; although the tortious conduct might have been considered as a breach of contract: See *Bohn* v. *Brown*, *Heacock* v. *Sherman*, *Cable* v. *McCune*, *supra;* and although a judgment has been recovered against the corporation, upon which the stockholders are sought to be held: *Bohn* v. *Brown*, *supra;* compare *Child* v. *Boston etc. Iron Works*, *supra*. But in *Carver* v. *Braintree Mfg. Co.*, 2 Story, 432, Mr. Justice Story thought the word "debt," in a statute of Massachusetts, was to be taken in its broadest sense as embracing any just demands, whether growing out of contract or out of tort; and he therefore held it to embrace a claim for unliquidated damages for the infringement of a patent; but see *Child* v. *Boston etc. Iron Works*, *supra*. However, a claim for a breach of warranty of title of a chattel is a "debt": *Dryden* v. *Kellogg*, 2 Mo. App. 87; but not such a debt as is to be paid within one year from the time it was contracted, within the meaning of an act declaring that "no stockholder shall be personally liable for the payment of any debt contracted by any company formed under the charter, which is not to be paid within one year from the time the debt is contracted": Id. If a statute provides that the stockholders shall be liable for all "debts and contracts" of the corporation, clearly it is not necessary that a claim against the corporation should be liquidated in order to charge the stockholders: *Haynes* v. *Brown*, 36 N. H. 545. A judgment is not a "debt": *Larrabee* v. *Baldwin*, 35 Cal. 155; and see *Bohn* v. *Brown*, 33 Mich. 257; compare *Child* v. *Boston etc. Iron Works*, 137 Mass. 516; 50 Am. Rep. 328.

It might be noticed here that the members of a corporation established under the laws of one state are liable upon contracts entered into by the corporation in another state, with citizens of that state, in like manner and to the same extent as upon contracts entered into in the state where the corpo-

ration is established, with citizens thereof: *Hutchins* v. *New England Coal Min. Co.*, 4 Allen, 580.

Interest and Costs. — If the principal of the original judgment, which has been obtained against the corporation, together with interest, does not exhaust the sum for which a stockholder is liable, the judgment, plainly, should carry interest as in other cases: *Grund* v. *Tucker*, 5 Kan. 70. "Moreover, if the creditor is kept out of his money through the refusal of the stockholder to pay when demand is made upon him, he ought to receive interest during the time he has been thus wrongfully delayed, although such interest, together with the principal, make a sum in excess of the amount for which the stockholder otherwise would have been liable": Thompson's Liability of Stockholders, sec. 374. It has been therefore held that interest will run against the stockholder from the time of the commencement of the suit against him, that being the time when the liability can be said to attach to him, although it results in charging him with a sum beyond that for which he was individually liable: Thompson's Liability of Stockholders, sec. 374; *Burr* v. *Wilcox*, 22 N. Y. 551; *Handy* v. *Draper*, 89 Id. 334; *Wehrman* v. *Realkirt*, 1 Cin. Sup. Ct. 230; *Mason* v. *Alexander*, 44 Ohio St. 318; but not from the date of the original liability of the company, or any other previous time: *Wehrman* v. *Realkirt*, *Burr* v. *Wilcox*, *supra;* compare *Grand Rapids Sav. Bank* v. *Warren*, 52 Mich. 557; *Cleveland* v. *Burnham*, 64 Wis. 347; although where a referee computed the interest on the plaintiff's demand from the date on which it became due the company, instead of from the date of the commencement of the action, but the indebtedness was less than the defendant's liability as a stockholder, and the allowance of interest did not swell it beyond that limit, there was held to be no error: *Wheeler* v. *Millar*, 90 N. Y. 353. So it is held, under the national banking act, that interest runs from the date of the comptroller's order, the amount due from the stockholders being then liquidated and payable: *Casey* v. *Galli*, 94 U. S. 673. But in *Cole* v. *Butler*, 43 Me. 401, *Sackett's Harbour Bank* v. *Blake*, 3 Rich. Eq. 225, *Munger* v. *Jacobson*, 99 Ill. 349, interest was denied where the amount of the recovery would thereby exceed the stockholder's original liability, Dunkin, C. J., in the case from Richardson, placing much stress upon the words "no further," in the New York statute of 1811, in question in the case, which provided that the stockholders should be responsible "to the extent of their respective shares of stock, and no further." And if a statute makes the stockholders of a bank liable to creditors "in proportion" to their stock, for the payment of unpaid bills, at the time the charter expires, interest, either from the time of dissolution, or from the time of the filing of a bill in equity against them will not be allowed, since no stockholder can tell how much he is to pay, or to whom, until it is ascertained by suit: *Crease* v. *Babcock*, 10 Met. 524, 568; *Grew* v. *Breed*, 10 Id. 569, 571.

It has also been held that a stockholder, made severally liable for the debts of a corporation, is also responsible for the costs of a proceeding taken against him by a creditor, although he is thereby compelled to pay a sum in excess of his original liability: *Grose* v. *Hill*, 36 Me. 22; *Cole* v. *Butler*, 43 Id. 401; on the principle that he should have paid the amount for which he was liable to the creditor, without putting the creditor to the expense of a suit; although it has been held that a judgment against a stockholder must not include any part of the costs of a proceeding against the corporation: *Bailey* v. *Bancker*, 3 Hill, 188; *Rorke* v. *Thomas*, 56 N. Y. 559, 565; but see *Grand Rapids Sav. Bank* v. *Warren*, 52 Mich. 557.

NATURE OF STATUTORY LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS. — The nature of the liability for the debts of a corporation, imposed upon stockholders for the benefit of creditors by constitutions, special charters, general acts of incorporation, and other statutes, has been much discussed, but in the main the principles are well settled.

Is Contract Liability. — A distinction should be noticed at the outset between the usual liability imposed upon stockholders for the corporate debts, and the liability occasionally imposed upon the officers of a corporation for its debts, because of their failure or neglect to perform some duty with which they are charged, which liability is also sometimes extended to the corporators and stockholders generally. In the latter case, the liability is penal in its nature: Note to *Hodges* v. *New England Screw Co.*, 53 Am. Dec. 651; *Bird* v. *Hayden*, 2 Abb. Pr., N. S., 61; *Halsey* v. *McLean*, 12 Allen, 438; *Cable* v. *McCune*, 26 Mo. 371, 380; 72 Am. Dec. 214, 215; *Smith* v. *Steele*, 8 Neb. 115; while in the former it is well settled the liability is not in the nature of a penalty, but of a contract. "This liability is in reality the result of an agreement or contractual relation formed between the shareholders and creditors of the corporation. Whether this agreement be called a contract or not is merely a matter of definition. It may not be a contract according to the technical rules of the common law; but it contains every essential element of a contract, and it is legally binding by virtue of statutory enactment": 2 Morawetz on Corporations, sec. 872. "A personal liability of stockholders for the debts of a corporation, in virtue of the charter, is not in the nature of penalty or forfeiture, and does not exist solely as a liability imposed by statute. It is not enforced simply as a statutory obligation, but is regarded as voluntarily assumed by the act of becoming a stockholder. By such act, he assents to be bound, or that his property shall be charged with debts of the corporation, to the extent and in the manner prescribed by the act of incorporation": *Lowry* v. *Inman*, 46 N. Y. 119, 125, *per* Allen, J.; compare *Keyser* v. *Hitz*, 2 Mackey, 473, *per* Cox, J.; and see also note to *Prince* v. *Lynch*, 99 Am. Dec. 433. Therefore, the liability is such as fairly to come within the spirit and intent of an act to facilitate the recovery of judgments in suits "where the cause of action is a contract": *Norris* v. *Wrenschall*, 34 Md. 492; and falls within a section of the statute of limitations providing that "actions of debt grounded upon any lending or contract, without specialty," shall be brought within a certain period of time: *Carrol* v. *Green*, 92 U. S. 509; *Terry* v. *Calnan*, 13 S. C. 220; and see *Bullard* v. *Bell*, 1 Mason, 243; compare *Atwood* v. *Rhode Island Agricultural Bank*, 1 R. I. 376; *Hawkins* v. *Furnace Co.*, 40 Ohio St. 507; and not within a section providing for the limitation of actions "upon any statute made or to be made for any forfeiture or cause, the benefit and suit whereof is limited to the party aggrieved": *Corning* v. *McCullough*, 1 N. Y. 47; 49 Am. Dec. 287; overruling, in this particular, *Fresland* v. *McCullough*, 1 Denio, 412; 43 Am. Dec. 685; compare *Gridley* v. *Barnes*, 103 Ill. 211; *Lawler* v. *Burt*, 7 Ohio St. 340. It is not a penalty, and therefore enforceable only in a court of law: *Queenan* v. *Palmer*, 117 Ill. 619. And the liability, being in effect a liability upon contract, cannot be discharged by a subsequent transfer of the stock: *Brown* v. *Hitchcock*, 36 Ohio St. 667, 668; *Harger* v. *Cleveland*, 36 Md. 476; see *post*; and this being the nature of the liability, the assignee of the obligation of a corporation takes all the rights of the assignor: *Blakeman* v. *Benton*, 9 Mo. App. 107; and a stockholder who has been held liable can maintain an action against other stockholders for a contribution: *Aspinwall* v. *Sacchi*, 57 N. Y. 331; and see *post*. Furthermore, as respects an ex-

ing creditor, it is part of the obligation of his contract, within the constitution of the United States, and not subject to repeal or modification by a state statute: *Hawthorne* v. *Calef*, 2 Wall. 10; *Story* v. *Furman*, 25 N. Y. 214, 221; *Van Hook* v. *Whitlock*, 26 Wend. 43; 37 Am. Dec. 246; *Provident Sav. Institution* v. *Jackson Place Skating etc. Rink*, 52 Mo. 552; *St. Louis R'y Supplies Co.* v. *Harbine*, 2 Mo. App. 134; *Blakeman* v. *Benton*, 9 Id. 107; compare *Coffin* v. *Rich*, 45 Me. 507; 71 Am. Dec. 559; *Cummings* v. *Maxwell*, 45 Me. 190; *Story* v. *Furman*, 25 N. Y. 214, 221; *Walker* v. *Crain*, 17 Barb. 119, 129; *Jermain's Adm'r* v. *Benton*, 79 Mo. 148; *Merchants' Ins. Co.* v. *Hill*, 86 Id. 466, affirming 12 Mo. App. 148. Not being penal, it may be enforced against a stockholder outside of the state where the corporation is formed: *Flash* v. *Conn*, 16 Fla. 428; 26 Am. Rep. 721; 109 U. S. 371; *Cuykendall* v. *Miles*, 10 Fed. Rep. 342; *Howell* v. *Manglesdorf*, 33 Kan. 194, 199; *Hodgson* v. *Cheever*, 8 Mo. App. 318; *Aultman's Appeal*, 98 Pa. St. 505; *Lowry* v. *Inman*, 46 N. Y. 119; and see *Woods* v. *Wicks*, 7 Lea, 40; note to *Prince* v. *Lynch*, 99 Am. Dec. 433; unless there are difficulties of procedure in the way: *Lowry* v. *Inman*, *supra*; *Christensen* v. *Eno*, 106 N. Y. 97; *Nimick* v. *Mingo Iron Works Co.*, 25 W. Va. 184; *Erickson* v. *Nesmith*, 15 Gray, 221; 4 Allen, 233; and see note to *Prince* v. *Lynch*, 99 Am. Dec. 433; compare *Drinkwater* v. *Portland Marine R'y*, 18 Me. 35. And being a contract liability, it survives against the personal representatives of a deceased stockholder: *Richmond* v. *Irons*, 121 U. S. 27; *Irons* v. *Manufacturers' Nat. Bank*, 21 Fed. Rep. 197, 198; *Chase* v. *Lord*, 77 N. Y. 1; 6 Abb. N. C. 258; *Manville* v. *Edgar*, 8 Mo. App. 324; but see *Child* v. *Coffin*, 17 Mass. 64; *Ripley* v. *Sampson*, 10 Pick. 371, 372; *Dane* v. *Dane Mfg. Co.*, 14 Gray, 488; *Cummings* v. *Wright*, 11 Mo. App. 348; *Donnelly* v. *Hodgson*, 13 Id. 15; and compare *Diversey* v. *Smith*, 103 Ill. 378.

Is for Exclusive Benefit of Creditors. — The statutory liability of stockholders is solely for the benefit of the creditors of the corporation. Therefore the corporation cannot enforce it by assessment: Cook on Stock and Stockholders, sec. 216; 2 Morawetz on Corporations, sec. 809; *Winsted* v. *Buskirk*, 17 Ohio St. 113; *Liberty Female College Ass'n* v. *Watkins*, 70 Mo. 13; and see *Wincock* v. *Turpin*, 96 Ill. 135; *Atwood* v. *Rhode Island Agricultural Bank*, 1 R. I. 376; nor can the corporation assign it to trustees for the benefit of creditors: Cook on Stock and Stockholders, sec. 216; Thompson's Liability of Stockholders, sec. 342; 2 Morawetz on Corporations, sec. 869; Taylor on Corporations, sec. 721; *Wright* v. *McCormack*, 17 Ohio St. 86; nor can the liability be enforced by the assignee in bankruptcy of the corporation: *Dutcher* v. *Marine Nat. Bank*, 12 Blatchf. 435; *Bristol* v. *Sanford*, 12 Id. 341; nor by a receiver of the corporation: Cook on Stock and Stockholders, sec. 216; Thompson's Liability of Stockholders, sec. 342; 2 Morawetz on Corporations, sec. 869; Taylor on Corporations, sec. 721; note to *Prince* v. *Lynch*, 99 Am. Dec. 434; *Jacobson* v. *Allen*, 20 Blatchf. 525; 12 Fed. Rep. 454; *Wincock* v. *Turpin*, 96 Ill. 135; *Mason* v. *New York Silk Mfg. Co.*, 27 Hun, 307; *Cuykendall* v. *Corning*, 88 N. Y. 129; *Farnsworth* v. *Wood*, 91 Id. 308; unless, by statute, the receiver is vested with the right to enforce the liability on behalf of creditors: *Walker* v. *Crain*, 17 Barb. 11; *Herkimer County Bank* v. *Furman*, 17 Id. 116, 119; *Story* v. *Furman*, 26 N. Y. 214; *Kennedy* v. *Gibson*, 8 Wall. 498; *Irons* v. *Manufacturers' Nat. Bank*, 27 Fed. Rep. 591, affirming 17 Id. 308; 21 Id. 197; *Richmond* v. *Irons*, 121 U. S. 27. Indeed, the fact that a corporation has gone into bankruptcy, or into the hands of a receiver, fixes the liability of stockholders to creditors: *Tibballs* v. *Libby*, 87 Ill. 142; *Arens* v. *Weir*, 89 Id. 25; *Wincock* v. *Turpin*, 96 Id. 135. "Neither a receiver, nor an assignee in bankruptcy, nor an assignee under

a voluntary general assignment for the benefit of creditors, each of whom represents creditors as well as the insolvent, acquires any right to enforce a collateral obligation given to a creditor, or to a body of creditors, by a third person, for the payment of the debts of the insolvent": *Jacobson* v. *Allen*, *supra*, per Wallace, J. The distinction between the liability of stockholders with respect to unpaid subscriptions, and their statutory liability, will at once be observed; for, as shown *supra*, unpaid subscriptions are assets which a corporation may assign for the benefit of creditors, and they may be collected by an assignee of the corporation in bankruptcy or insolvency, or by a receiver of the corporation.

Again, if the liability is imposed in favor of certain creditors only, no others can enforce it: *Wincock* v. *Turpin*, 96 Ill. 135; *Farnsworth* v. *Wood*, 91 N. Y. 308; in which latter case it is said: "The liability does not exist in favor of the corporation itself, nor for the benefit of all its creditors, but only in favor of such creditors as are within the prescribed conditions. It is not a general right, but one which attaches to the particular creditors only who are within the conditions, and is to be enforced by these in their own right and for their own special benefit." And creditors, in order to enforce the liability, need not be original creditors, but the liability of a stockholder is equally great to pay the assignee of a debt against the corporation as the assignor: *Came* v. *Brigham*, 39 Me. 35; *Blakeman* v. *Benton*, 9 Mo. App. 107; *Crease* v. *Babcock*, 10 Met. 524, 560; *Grew* v. *Breed*, 10 Id. 569, 579; although in *Gauch* v. *Harrison*, 12 Ill. App. 457, it was held that a creditor should be allowed only the amount he actually paid for the claims which he had purchased; *contra*, *Grew* v. *Breed*, 10 Met. 569, 579.

May be Waived by Creditors. — Since the statutory liability of stockholders for the corporate debts is for the benefit of creditors of the corporation, it may be waived by a creditor by express contract with the corporation: Cook on Stock and Stockholders, sec. 217; Thompson's Liability of Stockholders, sec. 75; 2 Morawetz on Corporations, sec. 871; Taylor on Corporations, sec. 735; *Robinson* v. *Bidwell*, 22 Cal. 379, 388; *French* v. *Teschemaker*, 24 Id. 518; *Basshor* v. *Forbes*, 36 Md. 154, 166; *Brown* v. *Eastern Slate Co.*, 134 Mass. 590; see also *In re Athenæum etc. Society*, 3 De Gex & J. 660; *Hallet* v. *Merchant Traders' etc. Association*, 13 Q. B. 960; *Durham's Case*, 4 Kay & J. 517; although the liability is founded upon a constitutional provision: *Robinson* v. *Bidwell*, *French* v. *Teschemaker*, *supra*; "and it is equally free from doubt that it may be waived by conduct on the part of the creditor, either at the time of making the contract or subsequently, indicating a clear understanding between the contracting parties that the creditor is to look only to the corporate funds, and not to the individual liability of the shareholders": Thompson's Liability of Stockholders, sec. 75. Therefore a stockholder, liable on notes of the corporation, is released from liability, where, after the transfer of his stock, the creditor gave up the notes to the company, and took new notes, especially if done for the purpose of absolving the stockholder from liability: *New England Commercial Bank* v. *Newport Steam Factory*, 6 R. I. 154; 75 Am. Dec. 688.

Stockholders are not Sureties or Guarantors. — It has sometimes been asserted that the individual liability assumed by the stockholders of a corporation for the security of its creditors was that of guarantors or of sureties: *Moss* v. *McCullough*, 5 Hill, 131; *Hanson* v. *Donkersley*, 37 Mich. 184; *Peck* v. *Miller*, 39 Id. 594, 597; *Milroy* v. *Spurr Mountain Iron Min. Co.*, 43 Id. 231, 238; *Grand Rapids Sav. Bank* v. *Warren*, 52 Id. 557, 561; *Grew* v. *Breed*, 10 Met. 569, 575; *Hicks* v. *Burns*, 38 N. H. 141; *Patterson* v. *Wyomissing Mfg. Co.*, 40

Pa. St. 117; and that therefore a judgment against the corporation was not even *prima facie* evidence of the debt in an action against a stockholder: *Moss* v. *McCullough*, *supra*; *sed qu.*; see note to *Charles* v. *Hoskins*, 83 Am. Dec. 380; and see *post*; and a stockholder was discharged from liability by the creditor's extending the time, and accepting the note of the corporation: *Hanson* v. *Donkersley*, *supra*; and see *Grew* v. *Breed*, *supra*; and no action could be maintained against a stockholder without notice of the neglect of the corporation to pay the debt: *Hicks* v. *Burns*, *supra*; but compare *Norris* v. *Wrenschall*, 34 Md. 492, 499. But, on the other hand, it has been expressly denied that stockholders are sureties or guarantors: *Harger* v. *McCullough*, 2 Denio, 119; *Moss* v. *Averill*, 10 N. Y. 449; *Moss* v. *McCullough*, 7 Barb. 279; *Aultman's Appeal*, 98 Pa. St. 505; *Craig's Appeal*, 92 Id. 396; *Perkins* v. *Sanders*, 56 Miss. 733; *Mokelumne Hill etc. Co.* v. *Woodbury*, 14 Cal. 265; *Davidson* v. *Rankin*, 34 Id. 503; *Prince* v. *Lynch*, 38 Id. 528; 99 Am. Dec. 427; *Young* v. *Rosenbaum*, 39 Cal. 646; *Sonoma Valley Bank* v. *Hill*, 59 Id. 107; and therefore stockholders are not discharged by the creditor's giving time to the corporation: *Harger* v. *McCullough*, *supra*; *Aultman's Appeal*, *supra*; virtually overruling *Moss* v. *McCullough*, *Patterson* v. *Wyomissing Mfg. Co.*, *supra*; and being original debtors, *scire facias*, to enforce payment of a judgment against the corporation, will not lie against the stockholders: *Southmayd* v. *Russ*, 3 Conn. 52. Mr. Morawetz says: "It is a truth, which no legislative act or judicial decision can alter, that a corporation consists of its share-holders, and that, when share-holders become individually liable for debts of their corporation, they become individually liable for debts which they themselves owe in a corporate capacity. This individual liability may be in some respects similar to that of suretyship, but it is certain that the share-holders are not in fact sureties, within the accepted meaning of that term": 2 Morawetz on Corporations, sec. 879. And Mr. Taylor observes: "That it is not the liability of guarantors seems too evident to require argument. Suretyship is a legal institution composed of peculiar rules, based on the general notion that a surety is a man conferring a benefit and receiving none in return": Taylor on Corporations, sec. 715. Some of the confusion of ideas seems to have resulted from the fact that in many states, either by virtue of positive statutory provisions, or otherwise, stockholders are not primarily liable, but judgment is first required to be obtained against the corporation, and execution returned unsatisfied, before they can be held, — a proposition which has no necessary connection with suretyship or guaranty.

Stockholders, whether Liable as Partners. — It is frequently stated that the statutory liability of stockholders for the debts of a corporation is that of partners or members of an incorporated association, to the extent indicated by the law-making power: *Mokelumne Hill etc. Co.* v. *Woodbury*, 14 Cal. 265; *Southmayd* v. *Russ*, 3 Conn. 52; *Deming* v. *Bull*, 10 Id. 409; *Paine* v. *Stewart*, 33 Id. 517; *Buchanan* v. *Meisser*, 105 Ill. 638; *Thompson* v. *Meisser*, 108 Id. 359; *Gauch* v. *Harrison*, 12 Ill. App. 457, 461; *Perkins* v. *Sanders*, 56 Miss. 733; *Erickson* v. *Nesmith*, 46 N. H. 371; *Allen* v. *Seawall*, 2 Wend. 327; 6 Id. 335; *Lindsay* v. *Hyatt*, 4 Edw. Ch. 97, 100; *Moss* v. *Oakley*, 2 Hill, 265, 269; *Bailey* v. *Bancker*, 3 Id. 188; 38 Am. Dec. 675; *Harger* v. *McCullough*, 2 Denio, 119, 124; *Corning* v. *McCullough*, 1 N. Y. 47; 49 Am. Dec. 287; *Story* v. *Furman*, 25 N. Y. 214, 221, 222; *Wiles* v. *Suydam*, 64 Id. 173, 176; *Wait* v. *Ferguson*, 14 Abb. Pr. 379; *Worrall* v. *Judson*, 5 Barb. 210, 212; *Moss* v. *McCullough*, 7 Id. 279; *Conant* v. *Van Schaick*, 24 Id. 87, 96; *Richardson* v. *Abendroth*, 43 Id. 162; *Conklin* v. *Furman*, 57 Id. 484, 489; 8 Abb. Pr., N. S., 161, 166; *Clark* v. *Myers*, 11 Hun, 608; *King* v. *Duncan*, 38 Id. 461,

464; *New England Commercial Bank* v. *Newport Steam Factory*, 6 R. I. 154; 75 Am. Dec. 688; *Planters' Bank* v. *Bivingsville Cotton Mfg. Co.*, 10 Rich. 95; *Coleman* v. *White*, 14 Wis. 700; 80 Am. Dec. 797; *Merchants' Bank* v. *Chandler*, 19 Wis. 434, 437. And it has therefore been frequently held that one stockholder who is a creditor of the corporation cannot maintain an action at law against the others to enforce their individual liability: *Bailey* v. *Bancker*, 3 Hill, 188; 38 Am. Dec. 625; *Wait* v. *Ferguson*, 14 Abb. Pr. 379; *Richardson* v. *Abendroth*, 43 Barb. 162; *Beers* v. *Waterbury*, 8 Bosw. 396, 413; *Clark* v. *Myers*, 11 Hun, 608; *Thompson* v. *Meisser*, 108 Ill. 359; *Perkins* v. *Sanders*, 56 Miss. 733; compare *Woodruff etc. Iron Works* v. *Chittenden*, 4 Bosw. 406; *Smith* v. *Londoner*, 5 Col. 365. His remedy is in equity for a contribution. It has even sometimes been said that stockholders are not made liable, but left liable, for the corporate indebtedness: See *Corning* v. *McCullough*, 1 N. Y. 47; 49 Am. Dec. 287; *Story* v. *Furman*, 25 N. Y. 214, 222; *Buchanan* v. *Meisser*, 105 Ill. 638; but this is palpably erroneous, and overlooks the indisputable rule of the common law that stockholders were not liable for the debts of the corporation. Mr. Morawetz thus observes, with reference to the doctrine in question: "Share-holders in a corporation are undoubtedly partners within a broad meaning of the term, and this is true whether they are subject to a special individual liability to creditors or not. But it is equally a fact that they are not partners within the narrow meaning of the term 'partners' under the common law. The very object of an act of incorporation is to enable the share-holders to form an association which is not a common-law partnership, and is not subject to the technical rules of the common law. The fact that the share-holders in a corporation are subject to an individual liability to creditors would merely constitute one point of resemblance between the association and a common-law partnership, but it would not render the association a common-law partnership, nor would it make the share-holders common-law partners. To reason that because the liability of the share-holders under the statute resembles the liability of partners under the common law, therefore it must be governed by the technical rules of the common law applicable to the liability of partners, indicates a confusion of ideas": 2 Morawetz on Corporations, sec. 878. "Share-holders," says Mr. Taylor, "are not, like partners, each other's agents; unlike partners, they may transfer their shares at will; then, ordinarily, even in respect of his statutory liability, a share-holder cannot be sued until the creditor has exhausted his legal remedies against the corporation; and finally, under some statutes, a share-holder may be sued alone, though in the end he is entitled to contribution from his fellow-share-holders. Undoubtedly there remains the main resemblance between the liability of partners and the statutory liability of share-holders, — that a share-holder, as well as a partner, is liable individually for the debts of the corporation or firm, — a resemblance which is especially prominent in the unlimited liability of a share-holder, who, like a partner, may be obliged to pay all the debts of the concern. And the danger lies here, lest with eyes fixed on this main resemblance, courts overlook minute differences, and in consequence fail to do accurate justice": Taylor on Corporations, sec. 716.

Liability, whether Primary, or Subject to Proceedings First Taken against Corporation. — If no statutory condition is imposed requiring creditors to first proceed against the corporation, the individual liability of stockholders is regarded as primary; and therefore an action to enforce the liability is maintainable without having obtained a judgment against the corporation, and an execution returned unsatisfied: *Spence* v. *Shapard*, 57 Ala. 596; *David-*

eon v. *Rankin*, 34 Cal. 503; *Young* v. *Rosenbaum*, 39 Id. 646; *Faymonville* v. *McCollough*, 59 Id. 285; *Morrow* v. *Superior Court*, 64 Id. 383; *Culver* v. *Third Nat. Bank*, 64 Ill. 528; *Queenan* v. *Palmer*, 117 Id. 619, 629; *Todhunter* v. *Randolph*, 29 Ind. 275; *Marion Township etc. Draining Co.* v. *Norris*, 37 Id. 424; *Shafer* v. *Moriarity*, 46 Id. 9; *Marshall* v. *Harris*, 55 Iowa, 182; *Perkins* v. *Church*, 31 Barb. 84; *McMahon* v. *Macy*, 51 N. Y. 155, 160; *Planters' Bank* v. *Bivingsville Cotton Mfg. Co.*, 10 Rich. 95; *Bird* v. *Calvert*, 22 S. C. 292; *Cleveland* v. *Marine Bank*, 17 Wis. 545; *Merchants' Bank* v. *Chandler*, 19 Id. 434, 545; *Sleeper* v. *Goodwin*, 67 Wis. 577, 586; see also *Manufacturing Co.* v. *Bradley*, 105 U. S. 175; and if a judgment is recovered against the corporation, the stockholders cannot be sued thereon: *Trippe* v. *Huncheon*, 82 Ind. 307; so it is no defense that property given in pledge by the corporation remains in the creditor's hands undisposed of: *Sonoma Valley Bank* v. *Hill*, 59 Cal. 107; nor is the creditor obliged first to exhaust his remedy against the sureties on the note of the corporation on which he sues before calling on the stockholders: *Connecticut River Savings Bank* v. *Fiske*, 60 N. H. 363; nor is it an objection to the maintenance of a suit against the stockholders that the plaintiffs have commenced an action against the corporation for the recovery of the same debt: Id.; and, it is held, a release by a creditor of a stockholder's liability for the debt discharges the corporation and the other stockholders to the same extent as the one to whom the release was executed: *Prince* v. *Lynch*, 38 Cal. 528; 99 Am. Dec. 427; so the indebtedness for which a stockholder is sought to be charged cannot be shown by entries in the books of the corporation, made by its employees: *Neilson* v. *Crawford*, 52 Cal. 248; *Haynes* v. *Brown*, 36 N. H. 545; *Hager* v. *Cleveland*, 36 Md. 476; but see *McHose* v. *Wheeler*, 45 Pa. St. 32. However, the cases are not agreed; and under the same circumstances, the liability is held not to be a primary resource or fund for the payment of the corporate debts, but that the legal remedies must first be exhausted against the corporation: *Wright* v. *McCormick*, 17 Ohio St. 86; *Brown* v. *Hitchcock*, 36 Id. 667, 676; *Hawkins* v. *Furnace Co.*, 40 Id. 507, 513; *Wehrman* v. *Reakirt*, 1 Cin. Sup. Ct. 230; *Appeal of Means*, 85 Pa. St. 75; *Craig's Appeal*, 92 Id. 396; *Cambridge Water Works* v. *Somerville Dyeing etc. Co.*, 4 Allen, 239; *Harper* v. *Union Mfg. Co.*, 100 Ill. 225; and see 2 Morawetz on Corporations, sec. 883; Cook on Stock and Stockholders, sec. 221; note to *Prince* v. *Lynch*, 99 Am. Dec. 434, favoring this view. Here, again, such a construction should be adopted as will best effectuate the legislative intent. Very generllay, however, a creditor is, either expressly or by necessary implication, required to obtain a judgment against the corporation, and have an execution issued thereon returned unsatisfied, as a prerequisite to proceeding against a stockholder to enforce his statutory liability: See *Hastings* v. *Harding*, 2 Dill. 99, 105; *Toucey* v. *Bowen*, 1 Biss. 81; *Thornton* v. *Lane*, 11 Ga. 459; *Hanson* v. *Donkersley*, 37 Mich. 184; *Freeland* v. *McCullough*, 1 Denio, 412; 43 Am. Dec. 685; *Patterson* v. *Wyomissing Mfg. Co.*, 40 Pa. St. 117; *Dauchy* v. *Brown*, 24 Vt. 197; and where an act requires the recovery of a judgment, and the return of an execution unsatisfied, as a condition precedent to an action against a stockholder, the complaint must allege these steps to have been taken: *Lindsley* v. *Simonds*, 2 Abb. Pr., N. S., 69. But where the required proceedings, as to obtaining a judgment against the corporation, and having an execution returned *nulla bona*, or as to instituting suit against the corporation within a limited period of time, as sometimes provided, would be impossible or nugatory, they are excused: See *Shellington* v. *Howland*, 53 N. Y. 371; *Kincaid* v. *Dwinelle*, 59 Id. 548; as where the corporation is notoriously insolvent: *Hodges* v. *Silver Hill Min. Co.*,

9 Or. 200; or is thrown into bankruptcy: *Shellington* v. *Howland*, 53 N. Y. 371; *State Savings Ass'n* v. *Kellogg*, 52 Mo. 583; *Dryden* v. *Kellogg*, 2 Mo. App. 87; but see *Birmingham Nat. Bank* v. *Mosser*, 14 Hun, 605; *Tarbell* v. *Page*, 24 Ill. 46; *Fourth Nat. Bank* v. *Francklyn*, 120 U. S. 747; or is in the hands of a receiver: *Paine* v. *Stewart*, 33 Conn. 516. It is, however, held that a judgment and execution returned *nulla bona* are only evidence of, and constitute one kind of proof of, insolvency: *Hodges* v. *Silver Hill Min. Co.*, *supra;* and that it might be shown by any competent evidence that the corporation had no goods on which a levy could be made: *Marks* v. *Hardy*, 12 Mo. App. 595; and it was sufficient if it be shown that execution issued against the corporation, and that there was no property whereon to levy it, though the return of *nulla bona* on the execution be made before the return day: Id.; but these are extreme cases. On the other hand, as to whether the return *nulla bona* is conclusive against the stockholder that no property existed, see *Chaffin* v. *Cummings*, 37 Me. 76; *Lane* v. *Harris*, 16 Ga. 217. It has been held that if the statute requires a judgment and execution against the corporation before the stockholders can be charged with their individual liability, a judgment and execution in the state where the corporation was formed are contemplated, and therefore necessary: *Rocky Mountains Nat. Bank* v. *Bliss*, 89 N. Y. 338; *Dean* v. *Mace*, 19 Hun, 391; *Viele* v. *Wells*, 9 Abb. N. C. 277; as to whether this is so in equitable proceedings by creditors to compel the payment of unpaid subscriptions, see *Patterson* v. *Lynde*, 112 Ill. 196, 204; *Bank of Virginia* v. *Adams*, 1 Pars. Sel. Cas. 534; and in suits for the same purpose by receivers and assignees for the benefit of creditors in other states: *Glenn* v. *Williams*, 60 Md. 93; *Dayton* v. *Borst*, 31 N. Y. 435, 438; *Patterson* v. *Lynde*, 112 Ill. 196, 206, discussed *supra*.

Under some statutes, creditors are obliged to bring suit against the corporation, as above intimated, within a limited period of time, before proceeding against the stockholders individually: See *Hastings* v. *Harding*, 2 Dill. 99; *Shellington* v. *Howland*, 53 N. Y. 371; *Birmingham National Bank* v. *Mosser*, 14 Hun, 605; *State Savings Ass'n* v. *Kellogg*, 52 Mo. 583; *Dryden* v. *Kellogg*, 2 Mo. App. 87; and where it is provided that no stockholder shall be personally liable for the payment of any debt contracted by the company, which is not paid within one year from the time the debt is contracted, nor unless a suit for the collection of the debt shall be brought against the company within one year after the debt shall become due, the liability of a stockholder cannot be renewed or extended by any renewal or extension of the indebtedness which the creditor may make with the corporation, as by the acceptance of the creditor's note: *Parrott* v. *Colby*, 6 Hun, 55, affirmed in 71 N. Y. 597. In other cases, a special demand upon the corporation is required. And where a statute provides that no suit to enforce the individual liability of a stockholder for the debts and contracts of the corporation "shall be commenced until after a legal demand of payment thereof shall have been made upon the company," the demand must be a personal one, so that payment might be made at once: *Haynes* v. *Brown*, 36 N. H. 545; *Connecticut River Savings Bank* v. *Fiske*, 60 Id. 363, 368.

Liability, whether Joint, Several, or Joint and Several. — In the consideration of the extent of the liability of stockholders for the debts of the corporation under a particular statutory provision, the manner of its enforcement, the parties to the action, and the judgment which should be rendered therein, it is frequently material to inquire as to whether the liability imposed is joint, several, or joint and several. It may be here remarked that the liability of a stockholder for unpaid subscriptions is necessarily several. He becomes a

several debtor of the corporation by his contract of subscription, or by assuming the obligations of such contract by afterwards purchasing the stock. At law, his subscription is enforceable against him solely by the corporation or its representatives; and in equity the liability does not cease to be several, although in a creditor's suit others may be joined with him: See *Hatch* v. *Dana*, 101 U. S. 205, 210. So where the constitution of a state provides that the stockholders "shall be liable for the indebtedness of such corporation to the amount of their stock subscribed and unpaid," the liability of a stockholder is likewise several: *Hodges* v. *Silver Hill Min. Co.*, 9 Or. 200. But whether the statutory liability of a stockholder be joint, several, or joint and several, depends upon no such principle, but solely upon the language of the charter or other statute. The question, as in other cases, is one of construction and interpretation. In some instances it is settled by language which leaves little or no doubt. Were the view that stockholders are liable as partners carried out to its logical extent, they would be jointly liable, so that they would have to be united as parties defendant in actions to enforce their liability, and a joint judgment would be entered up against them. If no limit, as is sometimes the case, is placed upon the liability of the stockholders, but they are made personally liable for the debts of the corporation without limit, plainly the liability should be held to be joint, with all its consequences: *Shafer* v. *Moriarity*, 46 Ind. 9; *Deming* v. *Bull*, 10 Conn. 409; compare *Von Glahn* v. *Harris*, 73 N. C. 323; *Von Glahn* v. *De Rossett*, 76 Id. 292, 293.

But if the liability of stockholders is confined to the "extent" or "amount" of their stock, or is "in proportion" to their stock, the liability, being unequal and limited, is several: *Shafer* v. *Moriarity*, 46 Ind. 9; *Paine* v. *Stewart*, 33 Conn. 517; *Bank of Poughkeepsie* v. *Ibbotson*, 24 Wend. 473; *Ohio Life Ins. & T. Co.* v. *Merchants' Ins. & T. Co.*, 11 Humph. 1, 33; 53 Am. Dec. 742; *Crease* v. *Babcock*, 10 Met. 524, 557, 568; *Perry* v. *Turner*, 55 Mo. 418, 426; *Pettibone* v. *McGraw*, 6 Mich. 441; *Lane* v. *Harris*, 16 Ga. 217; *Adkins* v. *Thornton*, 19 Id. 325, 328; although some cases, in holding the liability to be several, have placed considerable stress upon the statutory form which imposes a liability upon "each" stockholder in a certain amount: *Wright* v. *McCormack*, 17 Ohio St. 86; *Umsted* v. *Buskirk*, 17 Id. 113; *Brown* v. *Hitchcock*, 36 Id. 667, 681; *Wehrman* v. *Reakirt*, 1 Cin. Sup. Ct. 230; and see also *McCarthy* v. *Lavasche*, 89 Ill. 270; 31 Am. Rep. 83; *Vick* v. *Lane*, 56 Miss. 681; and it therefore follows that where an action at law is possible it can be sustained only against a single stockholder: *Perry* v. *Turner*, 55 Mo. 418, 426; or if the stockholders be joined, upon equitable considerations, a judgment *in solido* cannot be entered against them: *Crease* v. *Babcock*, 10 Met. 524, 557, 568; *Vick* v. *Lane*, 56 Miss. 681; and see *Paine* v. *Stewart*, 33 Conn. 517; and a stockholder's liability is not extended because other stockholders cannot be reached by process, or are insolvent: *Crease* v. *Babcock*, *supra*; *Adkins* v. *Thornton*, 19 Ga. 325, 328. Of course if the charter of a corporation provides that the stockholders shall be "severally and individually" liable, the liability is several: See *Flash* v. *Conn*, 109 U. S. 371; *Culver* v. *Third Nat. Bank*, 64 Ill. 528; *Wincock* v. *Turpin*, 96 Id. 135; *Norris* v. *Johnson*, 34 Md. 485; *Norris* v. *Wrenschall*, 34 Id. 492; *Weeks* v. *Love*, 50 N. Y. 568; *Mather* v. *Neidig*, 72 Id. 100; *Pfohl* v. *Simpson*, 74 Id. 137; so the liability is several under the national banking act, which provides that the stockholders "shall be held individually responsible, equally and ratably, and not one for another": *Kennedy* v. *Gibson*, 8 Wall. 498, 505; *United States* v. *Knox*, 102 U. S. 422; *Bailey* v. *Sawyer*, 4 Dill. 463.

It is sometimes provided that the stockholders shall be "jointly and severally" liable for the debts and contracts of the corporation: See *Grund* v. *Tucker*, 5 Kan. 70; *Hicks* v. *Burns*, 38 N. H. 141; *Burnap* v. *Haskins Steam Engine Co.*, 127 Mass. 596; *Hall* v. *Klinck*, 25 S. C. 348; 60 Am. Rep. 505; and see the expressions that stockholders are "jointly and severally liable as partners," used in *Perkins* v. *Sanders*, 56 Miss. 733; *Thompson* v. *Meisser*, 108 Ill. 359; but where the statute further enacted that "such sums as may be decreed to be paid by the stockholders in such suit in equity shall be assessed upon them in proportion to the amounts of stock by them respectively held at the time when the suit in which said judgment was recovered was begun, but no stockholder shall be liable to pay a larger sum than the amount of stock held by him at that time at its par value," a stockholder is not liable for the whole debt of a corporation *in solido*, but is liable severally for a *pro rata* part of the whole amount, in proportion to the stock held by him: *Burnap* v. *Haskins Steam Engine Co.*, *supra;* and although the Civil Code of California provides that "any creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of his claim payable by each," stockholders are not made jointly liable to each of the creditors of the corporation; and the amount of the creditor's demand against each stockholder determines the court in which the creditor may seek to enforce such stockholder's liability: *Derby* v. *Stevens*, 64 Cal. 287.

HOW STATUTORY LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS IS ENFORCED. — If the charter of a corporation, or some general statute, prescribes a special mode of enforcing the individual liability of the stockholders, it is well settled, upon the principle that where a statute confers a right and also prescribes a remedy, that remedy, and that only, can be pursued, that the liability can be enforced in no other way: *Fourth Nat. Bank* v. *Francklyn*, 120 U. S. 747; *Knowlton* v. *Ackley*, 8 Cush. 93; *Allen* v. *Walsh*, 25 Minn. 543; *Johnson* v. *Fischer*, 30 Id. 173; *Patterson* v. *Lane*, 35 Pa. St. 275; *Brinham* v. *Wellersburg Coal Co.*, 47 Id. 43; *Youghiogheny Shaft Co.* v. *Evans*, 72 Id. 331; *O'Reilly* v. *Bard*, 105 Id. 569, 574, 575; *Moies* v. *Sprague*, 9 R. I. 541; *Dauchy* v. *Brown*, 24 Vt. 197; *Windham Provident Inst.* v. *Sprague*, 43 Id. 502, 510; *Nimick* v. *Mingo Iron Works Co.*, 25 W. Va. 184, 204; 2 Morawetz on Corporations, sec. 893; but see *Ex parte Van Riper*, 20 Wend. 614; *Lionberger* v. *Broadway Savings Bank*, 10 Mo. App. 499; and the remedy must be strictly pursued: *Hoard* v. *Wilcox*, 47 Pa. St. 51; *Mansfield Iron Works* v. *Willcox*, 52 Id. 377, 378; *Lane's Appeal*, 105 Id. 49, 58; *O'Reilly* v. *Bard*, 105 Id. 569, 574. See, as construing such statutes prescribing a special manner of enforcing the stockholder's liability, *Leland* v. *Marsh*, 16 Mass. 389; *Stedman* v. *Eveleth*, 6 Met. 114; *Holyoke Bank* v. *Goodman Paper Mfg. Co.*, 9 Cush. 576; *Farnum* v. *Ballard Vale Machine Shop*, 12 Id. 507, 508; *Robbins* v. *Justices etc. of Superior Court*, 12 Gray, 225, 226; *Richmond* v. *Willis*, 13 Id. 182; *Johnson* v. *Somerville Dyeing etc. Co.*, 15 Id. 216; *Erskine* v. *Loewenstein*, 82 Mo. 301, affirming 11 Mo. App. 595. It is also sometimes provided that proceedings to enforce the individual liability of stockholders shall be in equity: See *Hadley* v. *Russell*, 40 N. H. 109; *Erickson* v. *Nesmith*, 46 Id. 371; *Rice* v. *Merrimac Hosiery Co.*, 56 Id. 114; *Connecticut River Savings Bank* v. *Fiske*, 60 Id. 363; *Erickson* v. *Nesmith*, 15 Gray, 222; *Irons* v. *Manufacturers' Nat. Bank*, 27 Fed. Rep. 591, affirming 17 Id. 308; 21 Id. 197; *Richmond* v. *Irons*, 121 U. S. 27; in which case undoubtedly, on the same principle, a stockholder must be pursued in equity.

Thus far, there is no dispute; but if no special remedy for enforcing the liability of stockholders be provided, the cases are extremely conflicting as to

whether the remedy is at law or in equity, or is at either law or equity. If no new right is created, but the liability of stockholders for unpaid subscriptions is simply preserved, then the remedy of a creditor is in equity, and not at law, as it would have been independently of the statutory provision: *Patterson* v. *Lynde*, 106 U. S. 519; 112 Ill. 196, 204, 207; *Bush* v. *Cartwright*, 7 Or. 329; *Brundage* v. *Monumental G. & S. Min. Co.*, 12 Id. 322; and see *Cornell's Appeal*, 114 Pa. St. 153, 163; *Crawford* v. *Rohrer*, 50 Md. 599; and compare *Hodges* v. *Silver Hill Min. Co.*, 9 Or. 200, 204; although it is held that where a statute provides that the stockholders of a corporation "shall be severally individually liable to the creditors of the company in which they are stockholders, to the amount of unpaid stock held by them respectively, for all debts and contracts made by such company," a creditor may maintain an action at law against an individual stockholder, and recover to the amount of unpaid stock held by him: *Smith* v. *Londoner*, 5 Col. 365; and see *Mills* v. *Stewart*, 41 N. Y. 384, 389; *Griffith* v. *Mangam*, 73 Id. 611; *Stephens* v. *Fox*, 83 Id. 313.

In some cases it is held that the individual liability of stockholders must be enforced in equity. Thus where the charter of a bank provided that the stockholders "shall be bound respectively for all the debts of the bank in proportion to their stock holden therein," it was held that the proper action was in equity, and not at law: *Pollard* v. *Bailey*, 20 Wall. 520, Waite, C. J., saying: "The provision for a proportionate liability is equivalent to a provision for an appropriate form of equitable action to enforce it. The case is different from what it would be if the charter had provided generally that all stockholders should be individually liable for the payment of the debts. The cases from New York cited upon the argument, and which are supposed to be in opposition to the view we have taken, involved the consideration of such a liability. . . . . After an examination of the several sections of this charter, it cannot for a moment be doubted that it was not only the intention to provide for a proportionate liability, but for a *pro rata* distribution among the different creditors according to their several priorities. Every provision is entirely inconsistent with the idea that one creditor could, by an individual suit, appropriate to himself the entire benefit of the security, and exclude all others. A common fund was created for the common benefit, to be collected and distributed by the receiver, who was made the common agent of all. There was no liability except for the deficiency. That was to be apportioned and collected for the common benefit." See also, to the same effect, *Terry* v. *Tubman*, 92 U. S. 156, 161; *Cuykendall* v. *Miles*, 10 Fed. Rep. 342, 344; *Terry* v. *Martin*, 10 S. C. 263; but compare *Bank of United States* v. *Dallam*, 4 Dana, 574; *Morrow* v. *Superior Court*, 64 Cal. 383.

Again, where the charter of a banking corporation provided that on failure of the bank each stockholder should be liable individually for a sum not exceeding twice the amount of his shares, a suit in equity was held to be the appropriate mode of enforcing the liability: *Terry* v. *Little*, 101 U. S. 216, the court saying: "The remedy must always be such as is appropriate to the liability to be enforced. The statute which creates the liability may declare the purposes of its creation, and provide directly or indirectly a remedy for its enforcement. If the object is to provide a fund out of which all creditors are to be paid share and share alike, it needs no argument to show that one creditor should not be permitted to appropriate to himself, without regard to the rights of others, that which is to make up the fund"; and see also *Mills* v. *Scott*, 99 Id. 25; *Smith* v. *Huckabee*, 53 Ala. 191; *Jones* v. *Jarman*, 34 Ark. 323; *Peck* v. *Miller*, 39 Mich. 594; *Harris* v. *First Parish in Dorchester*, 23

Pick. 112; *Wetherbee* v. *Baker*, 35 N. J. Eq. 501; *Wright* v. *McCormack*, 17 Ohio St. 86; *Umsted* v. *Buskirk*, 17 Id. 113; *Brown* v. *Hitchcock*, 36 Id. 667, 681; *Wehrman* v. *Reakirt*, 1 Cin. Sup. Ct. 230; *Atwood* v. *Rhode Island Agricultural Bank*, 1 R. I. 376; *Coleman* v. *White*, 14 Wis. 700; 80 Am. Dec. 797; and see *Harper* v. *Union Mfg. Co.*, 100 Ill. 225; *Rounds* v. *McCormick*, 114 Id. 252; *Von Glahn* v. *Harris*, 73 N. C. 323; *Von Glahn* v. *Lattimer*, 73 Id. 333; *Von Glahn* v. *De Rossett*, 76 Id. 292; in which latter cases the charter provided for a liability "to creditors," and effect was given to that expression.

In some of the earlier Illinois cases, the remedy against a stockholder made severally liable was held to be exclusively at law, on the principle that where a statute creates a right or liability the remedy is at law, unless the statute provides otherwise: *McCarthy* v. *Lavasche*, 89 Ill. 270; 31 Am. Rep. 83; *Hull* v. *Burtis*, 90 Ill. 213; *Wincock* v. *Turpin*, 96 Id. 135; *Lane* v. *Nickerson*, 99 Id. 284, 287; but the court has receded from this position: *Eames* v. *Doris*, 102 Id. 350; *Tunesma* v. *Schuttler*, 114 Id. 156; compare *Harper* v. *Union Mfg. Co.*, 100 Id. 226; *Rounds* v. *McCormick*, 114 Id. 252; *Queenan* v. *Palmer*, 117 Id. 619. And it might be here noticed that the suit by the receiver of a national bank to enforce the assessment made by the comptroller of the currency is at law: *Casey* v. *Galli*, 94 U. S. 673; *Bailey* v. *Sawyer*, 4 Dill. 463; but compare *Kennedy* v. *Gibson*, 8 Wall. 498, 505; although by the amendment of 1876 the individual liability of stockholders might be enforced by a bill in equity filed by any creditor: See *Irons* v. *Manufacturers' Nat. Bank*, 27 Fed. Rep. 591, affirming 17 Id. 308; 21 Id. 197; *Richmond* v. *Irons*, 121 U. S. 27.

But according to many authorities, if it be provided generally that the stockholders shall be individually liable for the debts of the corporation, and especially if it be provided that they shall be "severally," or "jointly and severally," liable, a creditor may sue either at law or in equity, according to the nature of the relief desired or made necessary by the circumstances of the case: See *Manufacturing Co.* v. *Bradley*, 105 U. S. 175, 182; *Flash* v. *Conn*, 109 Id. 371; *Morrow* v. *Superior Court*, 64 Cal. 383; *Adkins* v. *Thornton*, 19 Ga. 325; *Culver* v. *Third Nat. Bank*, 64 Ill. 528; *Eames* v. *Doris*, 102 Id. 350; *Tunesma* v. *Schuttler*, 114 Id. 156; *Grund* v. *Tucker*, 5 Kan. 70; *Bank of United States* v. *Dallam*, 4 Dana, 574; *Norris* v. *Johnson*, 34 Md. 485; *Norris* v. *Wrenschall*, 34 Id. 492; *Vick* v. *Lane*, 56 Miss. 681; *Perry* v. *Turner*, 55 Mo. 418, 426; *Hodgson* v. *Cheever*, 8 Mo. App. 318; *Briggs* v. *Penniman*, 8 Cow. 387; 18 Am. Dec. 454; *Bank of Poughkeepsie* v. *Ibbotson*, 24 Wend. 473; *Masters* v. *Rossie Lead Min. Co.*, 2 Sand. Ch. 301; *Bogardus* v. *Rosendale Mfg. Co.*, 7 N. Y. 147; *Garrison* v. *Howe*, 17 N. Y. 458, 463; *Weeks* v. *Love*, 50 N. Y. 568; *Mathez* v. *Neidig*, 72 Id. 100; *Griffith* v. *Mangam*, 73 Id. 611; *Pfohl* v. *Simpson*, 74 Id. 137; *Hall* v. *Klinck*, 25 S. C. 348; 60 Am. Rep. 505; compare *Young* v. *New York etc. Steamship Co.*, 15 Abb. Pr. 69; 10 Id. 229, 231. But a stockholder who is also a creditor of the corporation cannot maintain an action at law against the other stockholders, but must proceed in equity for a contribution: See *Bailey* v. *Bancker*, 3 Hill, 188; 38 Am. Dec. 625; *Wait* v. *Ferguson*, 14 Abb. Pr. 379; *Richardson* v. *Abendroth*, 43 Barb. 162; *Beers* v. *Waterbury*, 8 Bosw. 396, 413; *Clark* v. *Myers*, 11 Hun, 608; *Thompson* v. *Meisser*, 108 Ill. 359; *Perkins* v. *Sanders*, 56 Miss. 733; compare *Woodruff etc. Iron Works* v. *Chittenden*, 4 Bosw. 406; *Smith* v. *Londoner*, 5 Col. 365; and, on the other hand, if a stockholder is a creditor of the corporation to the amount of his liability, no action at law can be maintained against him by another creditor, since he has an interest in the fund sued for, the amount of which can only be determined by an accounting, which cannot be had in such

an action: *Garrison* v. *Howe*, 17 N. Y. 458, 463; *Mathes* v. *Niedig*, 72 N. Y. 100; and see *Agate* v. *Sands*, 73 Id. 620; *Wheeler* v. *Millar*, 90 Id. 353.

If the liability can be enforced at law, debt will lie, if the sum to be recovered is certain: *Bullard* v. *Bell*, 1 Mason, 243; but not if the amount to be recovered is not certain, and cannot be readily reduced to certainty: *Carrol* v. *Green*, 92 U. S. 509, 513.

It has been held that a judgment creditor could unite in the same action a claim to enforce the statutory liability of the stockholders for the debts of the corporation, with a claim to compel payment of unpaid subscriptions: *Warner* v. *Callender*, 20 Ohio St. 190; but not with a claim against the same persons, as officers, for failure to comply with some statutory duty: *Mappier* v. *Mortimer*, 11 Abb. Pr., N. S., 455, 459; *Cambridge Water Works* v. *Somerville Dyeing etc. Co.*, 14 Gray, 193.

PARTIES IN ACTIONS TO ENFORCE STATUTORY LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS. — The foregoing discussions as to the nature of a stockholder's statutory liability, and how it may be enforced, leave little to be added concerning parties. Wherever it is held that the proceeding against the stockholders must be in equity, either because some statutory provision preserves simply the liability to the extent of the unpaid subscriptions, or because it expressly requires a suit to be brought in equity, or because a proportionate liability is imposed, or a fund provided for, the rules heretofore given under the head "Parties to Bill in Equity" to compel the payment of unpaid subscriptions will apply; all the creditors should be parties plaintiff, or the suit should be in behalf of all: 2 Morawetz on Corporations, sec. 902; *Brundage* v. *Monumental G. & S. Min. Co.*, 12 Or. 322; *Crease* v. *Babcock*, 10 Met. 524, 531; *Grew* v. *Breed*, 10 Id. 569, 575; *First National Bank* v. *Hingham Mfg. Co.*, 127 Mass. 563; *Jones* v. *Jarman*, 34 Ark. 323; *Harper* v. *Union Mfg. Co.*, 100 Ill. 225; *Wetherbee* v. *Baker*, 35 N. J. Eq. 501; *Von Glahn* v. *Harris*, 73 N. C. 323; *Von Glahn* v. *Lattimer*, 73 Id. 333; *Von Glahn* v. *De Rossett*, 76 Id. 292; *Wright* v. *McCormack*, 17 Ohio St. 86; *Umsted* v. *Buskirk*, 17 Id. 113; *Brown* v. *Hitchcock*, 36 Id. 667, 681; *Wehrman* v. *Reakirt*, 1 Cin. Sup. Ct. 230; *Coleman* v. *White*, 14 Wis. 700; 80 Am. Dec. 797; but see *Cornell's Appeal*, 114 Pa. St. 153, 163; all the stockholders should be joined as parties defendant, unless it be impossible, useless, or impracticable: 2 Morawetz on Corporations, sec. 902; *Hadley* v. *Russell*, 40 N. H. 109; *Erickson* v. *Nesmith*, 46 Id. 371; *Rice* v. *Merrimac Hosiery Co.*, 56 Id. 114, 128; *Connecticut River Savings Bank* v. *Fiske*, 60 Id. 363, 368; *Jones* v. *Jarman*, 34 Ark. 323; *Umsted* v. *Buskirk*, 17 Ohio St. 113; *Coleman* v. *White*, 14 Wis. 700; 80 Am. Dec. 797; *Von Glahn* v. *Harris*, 73 N. C. 323; *Von Glahn* v. *De Rossett*, 76 Id. 292, 293; compare *Brundage* v. *Monumental G. & S. Min. Co.*, 12 Or. 322; and see *Cornell's Appeal*, 114 Pa. St. 153, 163; *Pettibone* v. *McGraw*, 6 Mich. 441; and the corporation should be made a co-defendant: 2 Morawetz on Corporations, sec. 903; *Umsted* v. *Buskirk*, 17 Ohio St. 113; *Coleman* v. *White*, 14 Wis. 700; 80 Am. Dec. 797; *Jones* v. *Jarman*, 34 Ark. 323; *Wetherbee* v. *Baker*, 35 N. J. Eq. 501; and see *Thompson* v. *Jewell*, 43 Mich. 240.

If the liability of stockholders is several, it is not possible, unless, perhaps, permitted by statute, to join them as defendants in an action at law to enforce the liability, but each creditor has a remedy against each stockholder: *Abbott* v. *Aspinwall*, 26 Barb. 202; *Morrow* v. *Superior Court*, 64 Cal. 383; if it be joint, they must all be sued jointly: *Allen* v. *Sewall*, 2 Wend. 327; and see *Overmyer* v. *Cannon*, 82 Ind. 457; and if joint and several, a joint action, or several actions, may be instituted: *Larrabee* v. *Baldwin*, 35 Cal. 155.

In Ohio, if stock is transferred after a debt is contracted, the assignees

should be made parties defendant in a suit in equity to enforce the individual liability of the assignors, the assignees being bound to discharge the liability, as between themselves and the assignors: *Wheeler* v. *Faurot*, 37 Ohio St. 25; and see *Bonewitz* v. *Van Wert County Bank*, 41 Id. 78.

JUDGMENT AGAINST CORPORATION, WHETHER CONCLUSIVE IN ACTION TO ENFORCE STOCKHOLDER'S STATUTORY LIABILITY. — It has already been shown that a judgment against a corporation is conclusive, in the absence of fraud or want of jurisdiction, in a creditor's suit against the stockholders to compel the payment of their unpaid subscriptions, so as to dispense with further proof of the creditor's claims. On principle, there is no reason why this rule should not apply in actions to enforce the statutory liability of stockholders. It makes no difference whether or not a judgment against the corporation is required to be obtained as a prerequisite to the enforcement of such liability. A judgment against the corporation is really a judgment against the stockholders in their corporate capacity, and the stockholders are amply represented in the action. The weight of authority is decidedly in favor of this view: Cook on Stock and Stockholders, sec. 222; 2 Morawetz on Corporations, sec. 886; *Slee* v. *Bloom*, 20 Johns. 669; *Moss* v. *Oakley*, 2 Hill, 265; *Moss* v. *McCullough*, 7 Barb. 279, 290; *Moss* v. *Averill*, 10 N. Y. 449, 452; *Belmont* v. *Coleman*, 21 Id. 96; *Conklin* v. *Furman*, 57 Barb. 484; 8 Abb. Pr., N. S., 161; *Hovey* v. *Ten Broeck*, 3 Robt. 316, 319; *Donworth* v. *Coolbaugh*, 5 Iowa, 300; *Corse* v. *Sanford*, 14 Id. 235; *Came* v. *Brigham*, 39 Me. 35; *Cole* v. *Butler*, 43 Id. 401; *Milliken* v. *Whitehouse*, 49 Id. 527; *Grund* v. *Tucker*, 5 Kan. 70; *Coalfield Co.* v. *Peck*, 98 Ill. 139; *Wilson* v. *Stockholders of Pittsburgh etc. Coal Co.*, 43 Pa. St. 424; *Cleveland* v. *Marine Bank*, 17 Wis. 545; *Merchants' Bank* v. *Chandler*, 19 Id. 545. Some few of these cases say the judgment is *prima facie* evidence, but only impeachable for fraud or want of jurisdiction, which, however, is simply stating the rule in another form. Nevertheless, some authorities hold the judgment to be to all intents and purposes *prima facie*: *Hoagland* v. *Bell*, 36 Barb. 57; *Schaeffer* v. *Missouri Home Ins. Co.*, 46 Mo. 248; *Grand Rapids Savings Bank* v. *Warren*, 52 Mich. 557; and see *Stephens* v. *Fox*, 83 N. Y. 313; and some hold that it is not even *prima facie*: *Moss* v. *McCullough*, 5 Hill, 131; *Strong* v. *Wheaton*, 38 Barb. 616; and see also *Miller* v. *White*, 50 N. Y. 137; *McMahon* v. *Macy*, 51 Id. 155, 162–165; *Union Bank* v. *Wando Mining etc. Co.*, 17 S. C. 339; *Chestnut* v. *Pennell*, 92 Ill. 55; *Whitman* v. *Cox*, 26 Me. 335; and *Merrill* v. *President etc. of Suffolk Bank*, 31 Id. 57, 50 Am. Dec. 649, overruling the same.

WHO ARE STOCKHOLDERS PERSONALLY LIABLE FOR CORPORATE DEBTS. — *In General, how One Becomes Stockholder.* — Some of the rules which will be given under this head, because announced in cases involving the individual liability of stockholders for the debts of corporations under charters and statutes, are of a general nature, and will equally apply to cases where creditors are seeking to compel stockholders to pay their unpaid subscriptions by equitable proceedings, while other rules are entirely special. It has been held that where the act under which a corporation was formed provided that the trustees and "corporators" should be individually liable for its debts until the whole of the capital subscribed shall have been paid in, and a certificate thereof recorded, the word "corporators" does not include stockholders: *Chase* v. *Lord*, 77 N. Y. 1; 6 Abb. N. C. 258; but *per contra*, the word "corporators," in a similar act, was held to be used in the sense of share-holders, and not that of commissioners or promoters in the organizing of the corporation: *Gulliver* v. *Roelle*, 100 Ill. 141; *Shufeldt* v. *Carver*, 8

Ill. App. 545. Such questions must evidently be decided upon a reading of the entire act.

It has been stated *ante*, under the division, "Who are Stockholders Liable to Creditors for Unpaid Subscriptions," that stockholders may become such either by original subscription, by direct purchase from the corporation, or by subsequent transfer from the original holders. But it is not necessary, in an action to enforce the individual liability of stockholders, for the plaintiff to state the particular manner in which the defendants acquired their stock. The averment that they were stockholders is sufficient: *Overmyer* v. *Cannon*, 82 Ind. 457. If all the capital stock of a corporation is subscribed for and taken at the time the articles of incorporation are filed, no subsequent subscribers, by merely writing their names in the corporation-book, and affixing a number of shares to their respective names, can acquire a right to any shares of stock, or become by such act stockholders of the corporation, and liable as such for its debts: *Lathrop* v. *Kneeland*, 46 Barb. 432. Plainly, one who never accepts, but refuses to accept, any stock in a corporation is not a stockholder, even though the secretary enters his name in the books as such: *Mudgett* v. *Horrel*, 33 Cal. 25. So a mere charge of shares of stock to a certain person made upon the stock-book of a corporation, without some evidence that such person admitted the charge to have been correctly made, or sanctioned the same, cannot make him the owner thereof, so as to render him individually liable to creditors of the corporation: *Fowler* v. *Ludwig*, 34 Me. 455, 459; but if a person named as a member in the certificate required by an act relating to corporations to be made out, acknowledged, and recorded, and, in the charter obtained thereunder, afterwards acts as a member, or does not disavow the relation as soon as he discovers the use made of his name, he cannot evade his liability as a member under the act, merely by showing that he was not in fact a subscriber, and never paid in any stock: *McHose* v. *Wheeler*, 45 Pa. St. 32. Mere irregularities in becoming a stockholder, however, cannot avail him as a defense to his statutory liability, if the corporation had waived the irregularities, and recognized him as a legal stockholder: *Holyoke Bank* v. *Goodman Paper Mfg. Co.*, 9 Cush. 576. Where executors, without authority, made an investment in the stock of a corporation, the estate cannot be held liable as a stockholder for corporate debts: *Diven* v. *Lee*, 36 N. Y. 302. But one who permits himself to be represented on the books of a corporation as a stockholder, and holds an office to which no one but a stockholder is eligible, cannot escape responsibility for the debts of the company by showing that the stock standing in his name was transferred to him simply to enable him to become an officer of the company: *Wolf* v. *St. Louis Independent Water Co.*, 15 Cal. 319; nor is it any defense to an action by creditors of a corporation against subscribers to its stock, that the defendants subscribed as agents of the corporation, which it was to hold and sell at pleasure for its benefit: *Allibone* v. *Hager*, 46 Pa. St. 48. Where a partnership owns stock in an insolvent corporation, a member of the firm will be liable to an execution, under the statutes of Missouri, against himself individually, as a stockholder, upon the motion of a creditor of the corporation, in all cases where the firm would be subject to such liability: *Bray's Adm'r* v. *Seligman's Adm'r*, 75 Mo. 31. "Each member of a partnership is liable for the indebtedness of the firm."

As in the case of creditors seeking to compel the payment by stockholders of unpaid subscriptions, so in proceedings by creditors to enforce the statutory personal liability of share-holders for the debts of the corporation, it is settled that a subscriber for shares is responsible as a stockholder, although

no certificate has been issued to him: *Mitchell* v. *Beckman*, 64 Cal. 117; *Corwith* v. *Culver*, 69 Ill. 502; *Chaffin* v. *Cummings*, 37 Me. 76, 83; *Hawes* v. *Anglo-Saxon Petroleum Co.*, 101 Mass. 385, 395; 111 Id. 200; *Schaeffer* v. *Missouri Home Ins. Co.*, 46 Mo. 248; *Spear* v. *Crawford*, 14 Wend. 20; 28 Am. Dec. 513; *Burr* v. *Wilcox*, 22 N. Y. 551; *Wheeler* v. *Millar*, 90 Id. 353; note to *Franklin Glass Co.* v. *Alexander*, 9 Am. Dec. 96; note to *Freeland* v. *McCullough*, 43 Id. 697; Cook on Stock and Stockholders, sec. 192; Thompson's Liability of Stockholders, sec. 106; and although the stock has not even been divided into shares: *Hawes* v. *Anglo-Saxon Petroleum Co.*, *supra;* so where a savings bank is converted into a national bank, neither the rights nor the liabilities of the stockholders are affected by the mere omission to issue a new form of stock certificate to them: *Keyser* v. *Hitz*, 2 Mackey, 473. Nor, of course, is the liability of the subscriber affected by the fact that he has not paid for his stock: *Mitchell* v. *Beckman*, 64 Cal. 117; *Chaffin* v. *Cummings*, 37 Me. 76, 83; *Schaeffer* v. *Missouri Home Ins. Co.*, 46 Mo. 248; *Spear* v. *Crawford*, 14 Wend. 20; 28 Am. Dec. 513; *Wheeler* v. *Millar*, 90 N. Y. 353; note to *Freeland* v. *McCullough*, 43 Am. Dec. 697.

Transfer — Stockholders when Debt was Contracted or Action Brought. — Where the stock has been transferred, the question of the party liable has been much disputed. If the charter or other statute simply provides that "the stockholders" shall be personally liable for the debts of the corporation, then, according to a respectable line of cases, only those who were stockholders at the time the debt was contracted, and not those who became such afterwards, are liable: *Moss* v. *Oakley*, 2 Hill, 265; *Judson* v. *Rossie Galena Co.*, 9 Paige, 598; 38 Am. Dec. 569; *Harper* v. *McCullough*, 2 Denio, 119, 122; *Tracy* v. *Yates*, 18 Barb. 152; *Phillips* v. *Therasson*, 11 Hun, 141; *Williams* v. *Hanna*, 40 Ind. 535; *Chesley* v. *Pierce*, 32 N. H. 388; *Larrabee* v. *Baldwin*, 35 Cal. 155; *Norris* v. *Johnson*, 34 Md. 485; *Norris* v. *Wrenschall*, 34 Id. 492; and see *Fleeson* v. *Savage S. M. Co.*, 3 Nev. 157; *Windham Provident Inst. for Savings* v. *Sprague*, 43 Vt. 502; Cal. Civ. Code, sec. 322; but compare *Freeland* v. *McCullough*, 1 Denio, 412; 43 Am. Dec. 685; *McCullough* v. *Moss*, 5 Denio, 567; *Sayles* v. *Bates*, 15 R. I. 342; *Root* v. *Sinnock*, 120 Ill. 350; 60 Am. Rep. 558. So where the charter of a banking corporation provided that if the corporation should refuse or neglect to pay its bills on demand, "the original stockholders, their successors, assigns, and the members of the said corporation," should, in their private capacities, be jointly and severally liable to the holder, it was held that only such of the original stockholders, their successors and assigns, as were members of the corporation when the payment of the bills were refused are liable: *Bond* v. *Appleton*, 8 Mass. 472; 5 Am. Dec. 111. The reasons for this rule are stated by Bronson, J., in the leading case of *Moss* v. *Oakley*, *supra*, as follows: "A man who purchases stock and comes into a corporation after it has been engaged in business may often be deceived in relation to the number and magnitude of its debts. But while he is a stockholder, he can know something about the extent of obligation contracted by the company, and is not wholly without the means of exerting an influence over those who manage its concerns; and as to those who may deal with the corporation, they bestow their labor or part with their property on the credit of those who are known to be stockholders"; and again, by Worden, J., in *Williams* v. *Hanna*, *supra:* "The holder of stock in a corporation has a voice in conducting the affairs of the corporation, so far, at least, as the selection of its officers is concerned, and has the means of knowing the situation of its affairs and business, and he should not be permitted to avoid his liability for the debts of the corporation by transferring

his stock to another person. On the other hand, the purchaser of stock who has previously had no connection with the corporation has not the means of knowing very definitely the amount of debts owed by the corporation. He may know the market value of the stock, but this furnishes no very safe criterion by which to determine the amount of indebtedness. The creditor, if he looks to the individual liability of the stockholders at all, looks to those who are stockholders at the time he lends his credit, and to those he should be content to look for the collection of his debt."

According to this view, it results that a stockholder cannot relieve himself from liability for debts already incurred by a transfer of his stock: See *Wehman* v. *Realkirt*, 1 Cin. Sup. Ct. 230, 237; *Brown* v. *Hitchcock*, 36 Ohio St. 667; but decided under a different theory; but for debts contracted by the company after he parts with his stock, he is not liable: *Matthews* v. *Albert*, 24 Md. 527. The complaint or declaration must show that the defendant was a stockholder when the debt was contracted: *Young* v. *New York etc. Steamship Co.*, 10 Abb. Pr. 229; 15 Id. 69; *Weber* v. *Fickey*, 47 Md. 196. But where the act under which a corporation was formed provided that the stockholders should be liable to the creditors of the company for all debts made by it, a person who was not a stockholder at the time a contract was made is liable for installments falling due thereunder after he became and while he continued to be a stockholder: *McMaster* v. *Davidson*, 29 Hun, 542; and where a statute provided that a retiring member of a corporation shall be liable only for a "debt" contracted by it while he was a member, since rent does not accrue to the lessor as a debt until the lessee has enjoyed the use of the land, no action can be maintained against a stockholder of a corporation which had leased certain premises for the rent of a quarter which commenced after he sold his stock, although the lease was executed before such sale: *Bordman* v. *Osborn*, 23 Pick. 295; and since a debt is merged in a judgment recovered thereon, a stockholder of a corporation, who had ceased to be a member thereof prior to the rendition of a judgment against the corporation, cannot be summoned, under the Massachusetts statute, in an action upon the judgment against the corporation, although he was liable on the original debt, having been a stockholder when the debt was contracted: *Handrahan* v. *Cheshire Iron Works*, 4 Allen, 396; *Mason* v. *Cheshire Iron Works*, 4 Id. 398, 399. So when the debt of a corporation is settled by its negotiable note, and that note, when due, is taken up by another note, the original liability being extinguished, in the absence of anything to the contrary, the date of the second note must be treated as the time when the indebtedness accrued, so far as relates to the liability of the stockholders: *Milliken* v. *Whitehouse*, 49 Me. 527; see also *Wheeler* v. *Faurot*, 37 Ohio St. 26.

Under some charters and general statutes, on the other hand, the time when the debt was contracted is not the criterion by which to determine who are liable as stockholders therefor. Thus, in an early case in Connecticut, it was held that where the charter of a corporation provided that "the persons and property of the members of said corporation shall, at all times, be liable for all debts due by said corporation," persons who were members at the time the debt was contracted, but had transferred their stock before the commencement of the action, were not liable: *President etc. of Middleton Bank* v. *Magill*, 5 Conn. 28; compare *Deming* v. *Bull*, 10 Id. 409; and where a statute under which a corporation was formed provided that the stockholders "shall be individually responsible, to the amount of their respective shares of stock, for all its indebtednoes and liabilities of every kind," it was decided that it

were not the stockholders at the time the debt accrued, but the stockholders at the time the action is commenced, who were individually responsible: *Cleveland* v. *Burnham*, 55 Wis. 598; but these cases are at variance with the numerous others cited *ante*. If, however, it is provided, as in an early statute of Massachusetts (act of 1808, c. 65, sec. 6), that an execution issued against a manufacturing corporation, if not satisfied within fourteen days after demand made upon the president, treasurer, or clerk of such corporation, may be levied upon the body or estate of any member or members, there is more reason in holding that this must be understood to be such as were members at the time of the commencement of the action: *Child* v. *Coffin*, 17 Mass. 64; *Ripley* v. *Sampson*, 10 Pick. 371, 372; and therefore, if a member died before the commencement of the action, the execution could not be levied upon his estate, no proceedings against executors or administrators having been provided: Id.; but see *Marcy* v. *Clark*, 17 Mass. 330, where it is said that the execution might be levied upon him who was a member at the time of the levy; and where a constitutional provision says that "in all cases each stockholder shall be individually liable" in a certain amount for the debts of the corporation, and a statute under it enacts that "if any execution shall have been issued against the property or effects of a corporation, and if there cannot be found whereon to levy such execution, then such execution may be issued against any of the stockholders" to the extent of such amount, the liability attaches to those who are actual stockholders when the execution is issued, and not to those who were stockholders when the debt was contracted, and who have transferred their stock in good faith to responsible parties: *McClaren* v. *Franciscus*, 43 Mo. 452; but it is held that, under these provisions, the liability of a stockholder is measured by the number of shares held by him at the date of the return of the execution against the corporation *nulla bona*, and not by the number he held when the motion for execution against him, as further required to be made by the statute, was filed: *Skrainka* v. *Allen*, 76 Mo. 384, reversing, in this particular, 7 Mo. App. 384. So where a statute of Maine (1836, c. 200) provided that "in case of deficiency of attachable corporate property or estate, the individual property, rights, and credits of any stockholder shall be liable to the amount of his stock for all debts of the corporation contracted prior to the transfer thereof for the term of one year after the record of the transfer in the books of the corporation, and for the term of six months after judgment recovered against said corporation, in any suit commenced within the year aforesaid," a stockholder may be liable, although the debt was contracted before he became such: *Longley* v. *Little*, 26 Me. 162; and where the charter of a corporation provided that "each stockholder shall be liable to double the amount of stock held or owned by him, and for three months after giving notice of transfer," the provision has reference to the continuance of the liability, and not to the time within which an action shall be instituted, and a stockholder is plainly liable for debts incurred while a member, and for those incurred for three months after he gives notice of the transfer of his stock: *Fuller* v. *Ledden*, 87 Ill. 310; *Hull* v. *Burtis*, 90 Id. 213; so, also, where the charter of a bank declared that no stockholder should be relieved from personal liability for the ultimate redemption of bills and notes issued by the bank by the sale of his stock until he shall have caused to be given sixty days' notice of said sale in some public gazette of the state, and in case of the failure of the bank, all the stockholders who may have sold their stock at any time within six months prior to said failure shall be liable in the same manner as if they had not sold their stock, all the stockholders who have given the required notice

are exempt, unless a failure occur within six months thereafter, and all the other stockholders are liable, whether they have transferred their stock or not: *Lane* v. *Morris*, 8 Ga. 468; *Thornton* v. *Lane*, 11 Id. 459; under the English companies act of 1862, also, past members remain liable to creditors for a limited period of time.

It has also been held that certain acts of incorporation and other statutes impose a liability for the debts of the corporation upon both stockholders who were such when the debts were contracted and stockholders who are such when the action is brought. Thus it is held that where a statute provides that "all members" or "all stockholders," shall be individually liable, those who were such when the debt was contracted, and also those who are such when the action is brought, are liable: *Curtis* v. *Harlow*, 12 Met. 3; *Holyoke Bank* v. *Burnham*, 11 Cush. 183; *Johnson* v. *Somerville Dyeing etc. Co.*, 15 Gray, 216; *Brown* v. *Hitchcock*, 36 Ohio St. 667; *Wheeler* v. *Faurot*, 37 Id. 26; *Bonewits* v. *Van Wert County Bank*, 41 Id. 78; *Mason* v. *Alexander*, 44 Id. 318, 338; but see *Reeder* v. *Maranda*, 66 Ind. 485; the courts finding this interpretation in the use of the word "all" by the legislature; and the same result has been reached in a few cases where the charters or statutes simply provided that "the members" or "the stockholders" should be liable: *Sayles* v. *Bates*, 15 R. I. 342; *Freeland* v. *M'Cullough*, 1 Denio, 414, 425; 43 Am. Dec. 685; *Root* v. *Sinnock*, 120 Ill. 350; 60 Am. Rep. 558; but see *supra*, the many contrary cases. It is evident, according to this ruling, that a stockholder is not relieved from liability for debts of the corporation incurred while he was such by a subsequent transfer of his stock: *Brown* v. *Hitchcock*, 36 Ohio St. 667; *Mason* v. *Alexander*, 44 Id. 318, 338; *Wehrman* v. *Realkirt*, 1 Cin. Sup. Ct. 230, 237; but he is not liable for debts contracted before he became a stockholder, if his membership ceased before the debts became payable and action brought: *Holyoke Bank* v. *Burnham*, 11 Cush. 183; *Sayles* v. *Bates*, 15 R. I. 342; note to *Prince* v. *Lynch*, 99 Am. Dec. 434; so the liability of stockholders for debts of the corporation incurred during their ownership of stock for which the promissory notes of the corporation were given, is discharged by the cancellation of such notes and the execution of new notes in payment of the debt, after the stockholders ceased to be such: *Wheeler* v. *Faurot*, 37 Ohio St. 26; and see *Milliken* v. *Whitehouse*, 49 Me. 527. And while it is thus held that stockholders who were such when a debt was contracted, and those who are such when action is brought, are liable, the extent of the liability is not increased, whether the stockholder first liable retained the stock or transferred it, and the successive assignees or holders, by accepting the stock, and the benefits arising therefrom, impliedly undertake to indemnify or discharge the assignor from the liability which attached to him while he held the stock: *Brown* v. *Hitchcock*, 36 Ohio St. 667; *Wheeler* v. *Faurot*, 37 Id. 26. As to when debts are to be regarded as contracted, it was held that when debts of a corporation were paid with the proceeds of bonds issued by the corporation, the debts represented by the bonds were contracted as and when the bonds were issued: *Sayles* v. *Bates*, 15 R. I. 342.

Each of these three diverging views as to the liability of stockholders in case of a transfer of stock has a decided argument in its favor. The reasons in support of the first view, holding only those liable who were stockholders when the debt was contracted, have already been given. The subsequent transferees are here the favored parties; while the second rule, which confines the liability to those who are stockholders when the action is commenced, favors the prior holders; and the third decidedly favors the creditors, in giving them a recourse, not only against those who were stockholders

when the debt was contracted, but those who are such when the liability is sought to be enforced. The opinion of Mr. Morawetz, who favors liability in point of time when the action is commenced, is worthy of quotation: "If it were held that each creditor of the corporation may pursue these particular persons who happened to be share-holders when the indebtedness arose, whether he has continued to be a share-holder or not, it would often become a matter of extreme difficulty, amounting to a practical impossibilty, to adjust the rights of the past and present share-holders; and there would be no object to be gained by adopting such a rule. The substantial rights of creditors are protected by the rule which invalidates a transfer as to creditors unless a solvent transferee is substituted in place of the transferrer; moreover, it cannot fairly be claimed that a person dealing with a corporation, organized on the usual plan in the United States, deals on the faith of the surety offered by the individuals who happen to be share-holders at the time": 2 Morawetz on Corporations, sec. 888. However, the question is one of construction and interpretation; and sometimes all difficulty is obviated by an express provision of the charter or statute which leaves no doubt as to the legislative intent.

Transfer, when Effective to Relieve from Liability. — Since a transfer of stock may, in the absence of anything to the contrary contained in the charter or in some general statute, operate to relieve the holder from debts thereafter incurred, or even, under some of the foregoing authorities, for existing debts, it becomes material to inquire under what circumstances the transfer is effective for this purpose. As a general rule, those who appear upon the books of the corporation at the time the liability attaches are primarily liable. While, therefore, a transfer may be good as between the parties themselves, unless it be consummated in the form required by the charter or by-laws of the corporation, by a change upon books of the company, the transferrer who still appears to be a stockholder when the liability attaches is liable: *Shellington* v. *Howland*, 53 N. Y. 371; *Worrall* v. *Judson*, 5 Barb. 210; *McClaren* v. *Franciscus*, 43 Mo. 452, 468; *Pullis* v. *Franciscus*, 43 Id. 469; *A. Wight Co.* v. *Steinkemeyer*, 6 Mo. App. 574; *Irons* v. *Manufacturers' Nat. Bank*, 27 Fed. Rep. 591; 17 Id. 308; *Richmond* v. *Irons*, 121 U. S. 27; but if no record of the transfer is required by the charter or by-laws, it is held that a stockholder may be relieved from liability by a transfer of his stock, although the transfer was never registered: *Sayles* v. *Bates*, 15 R. I. 342. In *Whitney* v. *Butler*, 118 U. S. 655, it was, however, held that the responsibility of the seller of stock of a national bank ceased upon his surrender of the certificate to the bank, and the delivery to its president of a power of attorney sufficient to effect a transfer of the stock on the books of the bank, although no formal transfer had been made. As to whether the purchaser of stock can be held liable as a stockholder before a formal transfer to him upon the books of the corporation, see *Cleveland* v. *Burnham*, 64 Wis. 347, in which the liability seems to have been denied. Clearly, where stock is transferred by one person to another, without the knowledge or consent of the latter, such transferee cannot be held liable as a stockholder unless he acquiesced in the transfer after notice thereof: *Robinson* v. *Lane*, 19 Ga. 337. Where shares of stock, with other property, were allotted to a widow out of her husband's estate, and an order of distribution made, and the estate settled, she having assented to the order, and accepted a part of the property so allotted, it was held that she became a stockholder, and liable as such to a creditor of the corporation: *Coquard* v. *Marshall*, 14 Mo. App. 80; and the same result was reached where an executrix, who inventoried stock as be-

longing to the estate, received the stock as residuary legatee, and collected dividends thereon, either as executrix or legatee: *Roeder* v. *Knobel*, 12 Id. 587; although in both cases no transfer had been made on the books of the company, and although the creditors failed in both to prove up their claims against the decedents' estates; but in *Simmons* v. *Ellis*, 17 Id. 470, a distributee of the estate of a deceased stockholder, no portion of the stock having been distributed, was held not liable.

Stock Held as Collateral Security or in Representative Capacity. — In accordance with the foregoing general rule, one to whom stock has been transferred upon the books of a corporation, and who appears thereon as a stockholder when the liability attaches, is liable as a stockholder, although the transfer was made as collateral security: *National Bank* v. *Case*, 99 U. S. 628; *Bowden* v. *Farmers' etc. Bank*, 1 Hughes, 307; *Moore* v. *Jones*, 3 Woods, 53; *Wheelock* v. *Kost*, 77 Ill. 296; *Hale* v. *Walker*, 31 Iowa, 344; *Magruder* v. *Colston*, 44 Md. 349; *Crease* v. *Babcock*, 10 Met. 524, 545; *Grew* v. *Breed*, 10 Id. 569, 576; *Holyoke Bank* v. *Burnham*, 11 Cush. 183; *Johnson* v. *Somerville Dyeing etc. Co.*, 15 Gray, 216; *First Nat. Bank* v. *Hingham Mfg. Co.*, 127 Mass. 563; *Adderly* v. *Storm*, 6 Hill, 624; *Rosevelt* v. *Brown*, 11 N. Y. 148; *In re Empire City Nat. Bank*, 18 Id. 119, 223; *Aultman's Appeal*, 98 Pa. St. 505; *Erskine* v. *Lowenstein*, 82 Mo. 301, affirming 11 Mo. App. 595; Thompson's Liability of Stockholders, sec. 223; Taylor on Corporations, sec. 741; and this, although the debt to secure which the stock was transferred is in fact paid: *Bowden* v. *Farmers' etc. Bank*, *Johnson* v. *Somerville Dyeing etc. Co.*, *Erskine* v. *Lowenstein*, *supra*. The same rule prevails in suits by creditors of corporations, or in their behalf, to compel the payment by stockholders of unpaid subscriptions: See *supra*; *Pullman* v. *Upton*, 96 U. S. 328. But, in accordance with the same rule, a holder of stock as collateral security, to whom the stock has not been transferred upon the books of the corporation, is not liable as a stockholder: *Henkle* v. *Salem Mfg. Co.*, 39 Ohio St. 547. The general rule likewise applies when the stock is held as trustee for others: *Grew* v. *Breed*, 10 Met. 569, 576; and see, to the same effect, *supra*, *Mann* v. *Currie*, 2 Barb. 294, and *McKim* v. *Glenn*, 66 Md. 479, under the general liability of stockholders to creditors for unpaid subscriptions; although, it has been held, the trust appeared upon the books of the corporation: *Grew* v. *Breed*, *supra*. Sometimes, however, statutes provide that persons holding stock in a representative capacity, such as trustees, executors, and guardians, and persons holding stock as collateral security, shall not be personally liable as stockholders, but the person or estate represented, or the pledgor, as the case may be, shall be liable. Under such a statute, it has been held that where one was sought to be individually charged as a stockholder, evidence was proper, upon his part, to show that an assignment of stock, absolute upon its face, was in fact given and held as collateral security only: *McMahon* v. *Macy*, 51 N. Y. 155; *Burgess* v. *Seligman*, 107 U. S. 20; *Union Savings Ass'n* v. *Seligman*, 92 Mo. 635; 1 Am. St. Rep. 776. But one who subscribes for stock in his own name, for the benefit of another, is held not to be exempted from individual liability as a trustee under the New York act of 1848: *Stover* v. *Flack*, 30 Id. 64. It was at one time held in Missouri, under such a statutory exception, that the statute had no application to stock which was not issued in the usual course of business, and therefore it did not exempt from liability persons holding as collateral security unsubscribed stock issued to them by a corporation: *Griswold* v. *Seligman*, 72 Mo. 110; *Fisher* v. *Seligman*, 75 Id. 13, reversing 7 Mo. App. 383; but these cases have been overruled, and it is now held that persons to whom a corporation itself pledges its stock are within the exemption:

Burgess v. *Seligman*, 107 U. S. 20; *Union Savings Ass'n* v. *Seligman*, 92 Mo. 635; 1 Am. St. Rep. 776; and under these latter rulings, the act of voting the stock, by the persons so holding it, will not make them absolute stockholders, either as between themselves and the corporation, or as between themselves and corporate creditors: Compare *Fisher* v. *Seligman*, *supra*.

Transfer must be Bona Fide. — In order, in any event, that a stockholder may relieve himself from individual liability to creditors of a corporation for its debts, the transfer must be *bona fide*. A transfer of stock to an irresponsible person, for the purpose of escaping personal liability to creditors, is, as to them, inoperative and void: *Bowden* v. *Johnson*, 107 U. S. 251; *Bowden* v. *Santos*, 1 Hughes, 158; *Central Agricultural etc. Ass'n* v. *Alabama Gold L. Ins. Co.*, 70 Ala. 120; *Paine* v. *Stewart*, 33 Conn. 517; *Marcy* v. *Clark*, 17 Mass. 330; *McClaren* v. *Franciscus*, 43 Mo. 452; *Provident Savings Inst.* v. *Jackson Place Skating etc. Rink*, 52 Id. 557; *Veiller* v. *Brown*, 18 Hun, 571; *Aultman's Appeal*, 98 Pa. St. 505; *Dauchy* v. *Brown*, 24 Vt. 197; Cook on Stock and Stockholders, sec. 265; and see also, to the same effect, under the general liability of stockholders for unpaid subscriptions, *Rider* v. *Morrison*, 54 Md. 429, 444; *Nathan* v. *Whitlock*, 9 Paige, 152; *Mandion* v. *Firemen's Ins. Co.*, 11 Rob. (La.) 177; but if the transfer be made honestly, and without any intention of defeating the creditors, the mere fact that the purchaser was insolvent at the time is not sufficient to hold the transferrer still liable for the debts: *Miller* v. *Great Republic Ins. Co.*, 50 Mo. 55; the question is, whether or not the transfer was fraudulent; so a husband who in good faith assigns to his wife, who is capable by statute of becoming a stockholder, his stock in a solvent corporation is relieved from further liability as a stockholder: *Simmons* v. *Dent*, 16 Mo. App. 288. On the same principle a purchaser of stock who has it transferred upon the books of the corporation from the seller to an irresponsible third person, in order to avoid the individual liability of a stockholder, is nevertheless liable so long as he remains the actual owner of the stock: *Davis* v. *Stevens*, 17 Blatchf. 259; *Case* v. *Small*, 4 Woods, 78; 10 Fed. Rep. 722; and one who subscribes to stock in the names of infants, for the purpose of avoiding individual responsibility, is, notwithstanding, responsible: *Castleman* v. *Holmes*, 4 J. J. Marsh. 1; *Roman* v. *Fry*, 5 Id. 634. But it is nevertheless held that a pledgee of stock in a national bank who, in good faith and with no fraudulent intent, takes the stock in the name of an irresponsible trustee, for the avowed purpose of avoiding liability as a share-holder, and who exercises none of the powers or rights of a stockholder, incurs no liability as such to creditors of the bank in case of its failure: *Anderson* v. *Philadelphia Warehouse Co.*, 111 U. S. 479; and a sale of the stock, under an authority conferred by the terms of a pledge, is not obnoxious to the charge of having been done in fraud of creditors, although its leading object and purpose may have been, on the part of the pledgees, to avoid liability under the national banking act: *Magruder* v. *Colston*, 44 Md. 349; so a retransfer on the books of the corporation of shares of stock by the vendee to the vendor, in pursuance of an agreement to do so, made contemporaneously with the original transfer from the vendor to the vendee, terminates the vendee's individual liability as a stockholder for the debts of the company, although made for that very purpose: *Holyoke Bank* v. *Burnham*, 11 Cush. 183.

Stock-books as Evidence of Ownership. — The stock-books of a corporation are generally held to be *prima facie* evidence of the ownership of stock in those whose names appear thereon as stockholders for the purpose of charging them individually with the corporate debts: *Hoagland* v. *Bell*, 36 Barb. 57; *Thornton* v. *Lane*, 11 Ga. 459; compare *Stanley* v. *Stanley*, 26 Me. 191;

and see, to the same effect, in proceedings to charge stockholders with unpaid subscriptions, *Turnbull* v. *Payson*, 95 U. S. 418; *Webster* v. *Upton*, 91 Id. 65, 72; *Glenn* v. *Springs*, 26 Fed. Rep. 494; but in *Mudgett* v. *Horrell*, 33 Cal. 25, it was held that where a statute provides that the stock-book "shall be presumptive evidence of the facts therein stated in any action or proceeding against the company, or against any one or more stockholders," the book is nevertheless not admissible in evidence in an action by a creditor of the corporation against one claimed to be a stockholder, for the purpose of proving that he is such; and in fixing the ownership of stock, it is not competent to give in evidence the declarations of the officers and agents of the company for that purpose: *Robinson* v. *Lane*, 19 Ga. 337.

Bill for Discovery of Stockholders. — A bill for discovery of the individual members of a corporation made liable by statute for its debts has been held sustainable by the creditors: *President etc. of Middletown Bank* v. *Russ*, 3 Conn. 145; *Bogardus* v. *Rosendale Mfg. Co.*, 7 N. Y. 147; probably an unnecessary and obsolete proceeding everywhere at the present day; and, to the same effect, in proceedings by creditors to reach unpaid subscriptions, see *Morgan* v. *New York etc. R. R.*, 10 Paige, 290; 40 Am. Dec. 244; *Miers* v. *Zanesville etc. Turnpike Co.*, 11 Ohio, 273.

Married Women are Subject to Statutory Liability of Stockholders for Corporate Debts. — Since a married woman may become the owner of stock of a corporation, and since the liability of stockholders for the debts of the corporation is a statutory liability, and incident to the ownership of stock, it is settled that a married woman is subject to such liability: *Sayles* v. *Bates*, 15 R. I. 342; *Keyser* v. *Hitz*, 2 Mackey, 473; *Anderson* v. *Line*, 14 Fed. Rep. 405; *In re Reciprocity Bank*, 22 N. Y. 9; *Simmons* v. *Dent*, 12 Mo. App. 288.

LEGISLATIVE POWER TO IMPOSE, REPEAL, OR MODIFY STATUTORY LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS. — As has already been stated, a statute, or an ordinance of a state constitution, which repeals a former statute or constitutional provision making the stockholders of a corporation individually liable for its debts, or which reduces the extent of the liability by amendment, is, as respects creditors whose debts were contracted prior to its passage, in derogation of the constitution of the United States, and void: Thompson's Liability of Stockholders, sec. 71; *Hawthorne* v. *Calef*, 2 Wall. 10; *Provident Savings Inst.* v. *Jackson Place Skating etc. Rink*, 52 Mo. 552; *Jerman's Adm'r* v. *Benton*, 79 Id. 148; *St. Louis Railway Supplies Co.* v. *Harbine*, 2 Mo. App. 134; compare *Robinson* v. *Bank of Darien*, 18 Ga. 65; although the holder of evidences of debt against the corporation became such after the modification: *Blakeman* v. *Benton*, 9 Mo. App. 107; but a creditor may waive his right to claim the constitutional protection: *Van Hook* v. *Whitlock*, 26 Wend. 43; 37 Am. Dec. 246; and where the individual liability imposed by a constitution was lessened by an amendment, a stockholder who becomes such after the amendment is not liable, according to the original form of the provision, for debts owing by the corporation prior to the amendment: *Ochiltree* v. *Iowa Railroad Contracting Co.*, 54 Mo. 113; affirmed in *Ochiltree* v. *Railroad Co.*, 21 Wall. 249. But a statute which affects the remedy of the creditor merely is not invalid: Thompson's Liability of Stockholders, sec. 73; *Merchants' Ins. Co.* v. *Hill*, 86 Mo. 466, affirming 12 Mo. App. 148; *Cummings* v. *Maxwell*, 45 Me. 190; *Coffin* v. *Rich*, 45 Id. 507; 71 Am. Dec. 559; *Story* v. *Furman*, 25 N. Y. 214; *Penniman, Petitioner*, 11 R. I. 333; compare *Walker* v. *Crain*, 17 Barb. 119, 129.

As far as the power of the legislature to impose an individual liability upon the stockholders of an existing corporation is concerned, there is no doubt

that if the right has been reserved, it may be exercised: *Weidenger* v. *Spruance*, 101 Ill. 278; *In re Empire City Bank*, 18 N. Y. 119; *Bailey* v. *Hollister*, 26 Id. 112; and where the charter of a corporation provided "that no stockholder of the corporation hereby created shall be liable, in his individual capacity, for any debt or liability of said company beyond the amount of stock held by him," the section is one of limitation and restriction only, and a stockholder cannot claim that a subsequent statute fixing the liability to that amount, and prescribing a mode of enforcing it, impaired the obligation of his contract: *Gridley* v. *Barnes*, 103 Ill. 211; *Arens* v. *Weir*, 89 Id. 25-28. But it has been held, in cases where there was no such reservation, that a statute which makes the stockholders of an existing corporation liable for its future debts was a valid exercise of the legislative power: *Gray* v. *Coffin*, 9 Cush. 192, 200; *Stanley* v. *Stanley*, 26 Me. 191; *Coffin* v. *Rich*, 45 Id. 507; 71 Am. Dec. 559; but it would be otherwise if the charter imposed a liability, and provided that the charter should not be altered or amended except by the consent of a majority of the stockholders, and subsequently a greater liability was imposed, to which the stockholders never assented: *Steacy* v. *Little Rock etc. R. R.*, 5 Dill. 348. And in Ohio it was held that a statute which authorized assessments against stockholders, who have paid the full amount of their subscriptions, without their consent, was a law impairing the validity of the stockholders' contract with the company, and therefore unconstitutional: *Ireland* v. *Palestine etc. Turnpike Co.*, 19 Ohio St. 369; but Mr. Thompson "cannot avoid thinking that this case is based on an erroneous premise, namely, that for all purposes a corporation is a distinct person from the members; whereas, the sound doctrine is, that they are distinct only for certain purposes of convenience in the transaction of business, and in the administration of justice": Thompson's Liability of Stockholders, sec. 67.

STATUTORY LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS, WHETHER MAY BE ENFORCED OUTSIDE OF STATE IN WHICH CORPORATION IS ORGANIZED. — It has been heretofore seen that certain cases maintain that the judgment against the corporation which creditors are required to obtain before proceeding in equity to compel stockholders to pay their unpaid subscriptions must be a judgment of the state in which the creditor's suit is commenced: *Patterson* v. *Lynde*, 112 Ill. 196, 204; *Bank of Virginia* v. *Adams*, 1 Pars. Sel. Cas. 534; which means a denial of the right to file a creditor's bill outside of the state in which the corporation is formed, — the court having no jurisdiction over foreign corporations; but that a receiver or an assignee for the benefit of creditors may maintain an action at law to recover unpaid subscriptions against a stockholder in another state: *Patterson* v. *Lynde*, 112 Ill. 196, 206; *Dayton* v. *Borst*, 31 N. Y. 435, 438; *Glenn* v. *Williams*, 60 Md. 93. It has also been seen that the usual statutory liability of stockholders for the debts of the corporation is not in the nature of a penalty, but of a contract, and that it may therefore be enforced in a state other than that in which the corporation was created: *Flash* v. *Conn*, 16 Fla. 428; 26 Am. Rep. 721; 109 U. S. 371; *Cuykendall* v. *Miles*, 10 Fed. Rep. 342; *Howell* v. *Mangledorf*, 33 Kan. 194, 199; *Hodgson* v. *Cheever*, 8 Mo. App. 318; *Aultman's Appeal*, 98 Pa. St. 505; and see *Woods* v. *Wicks*, 7 Lea, 40; *Drinkwater* v. *Portland Marine R'y*, 18 Me. 35; differing from the case where a liability for debts is imposed upon officers of a corporation, and sometimes upon the stockholders also, for the failure or neglect to comply with some duty imposed: See Cook on Stock and Stockholders, sec. 218; Thompson's Liability of Stockholders, sec. 82; but it is equally well settled that if a special remedy is given creditors against the stockholders, it cannot be en-

forced in another state: *Lowry* v. *Inman*, 46 N. Y. 119; *Christensen* v. *Eno*, 106 Id. 97; *Nimick* v. *Mingo Iron Works Co.*, 25 W. Va. 184; even if the remedy provided be a suit in equity, because of the inherent difficulties of first obtaining a judgment against the corporation, and next making the corporation a party to the bill: *Erickson* v. *Nesmith*, 4 Allen, 233; *Nimick* v. *Mingo Iron Works Co.*, 25 W. Va. 184; and see *Erickson* v. *Nesmith*, 15 Gray, 221; see also Cook on Stock and Stockholders, sec. 219. So where an act under which a corporation is formed requires, as a condition precedent to the bringing of an action against a stockholder to enforce his individual liability, that judgment shall be recovered against the corporation, and execution issued and returned unsatisfied, a judgment in and an execution issued out of a court of the state in which the corporation exists are contemplated: *Rocky Mountains Nat. Bank* v. *Bliss*, 89 N. Y. 338; *Dean* v. *Mace*, 19 Hun, 391; *Viele* v. *Wells*, 9 Abb. N. C. 277.

SURVIVAL OF STATUTORY LIABILITY FOR CORPORATE DEBTS AGAINST DECEDENT STOCKHOLDER'S PERSONAL REPRESENTATIVES. — Since the general individual liability of stockholders for the corporate debts is a contract liability, and not a penalty, it survives as against the personal representatives of a deceased stockholder: *Richmond* v. *Irons*, 121 U. S. 27; *Irons* v. *Manufacturers' Nat. Bank*, 21 Fed. Rep. 197, 198; *Manville* v. *Edgar*, 8 Mo. App. 324; and see *Chase* v. *Lord*, 77 N. Y. 1; 6 Abb. N. C. 258; compare *Diversey* v. *Smith*, 103 Ill. 378; but as to whether the peculiar remedy provided against stockholders in Massachusetts and Missouri can be enforced against the estate of a deceased stockholder, see *Child* v. *Coffin*, 17 Mass. 64; *Ripley* v. *Sampson*, 10 Pick. 371, 372: *Dane* v. *Dane Mfg. Co.*, 14 Gray, 488; *Cummings* v. *Wright*, 11 Mo. App. 348; *Donnelly* v. *Hodgson*, 13 Id. 15; although it may be that if the liability is joint, upon the death of a stockholder the liability at law remains only against the survivors: *New England Commercial Bank* v. *Newport Steam Factory*, 6 R. I. 154; 75 Am. De. 688; but the creditor may proceed against the estate of the deceased stockholder in equity: Id. If claims against decedents are required to be presented to the personal representatives for allowance, the claim against a deceased stockholder must be so presented: *Davidson* v. *Rankin*, 34 Cal. 503; compare *Roeder* v. *Knobel*, 12 Mo. App. 587; *Coquard* v. *Marshall*, 14 Id. 80; but unpaid capital of a corporation being a trust fund for the benefit of creditors, it is properly no part of a deceased stockholder's estate, and therefore a creditor of the corporation can maintain a suit against the stockholder's personal representatives to compel the payment of his unpaid subscription without presenting any demand to the representatives for allowance: *Thompson* v. *Reno Sav. Bank*, 19 Nev. 242, *post*, p. 883.

PRIORITY OF CREDITOR FIRST SUING STOCKHOLDER TO ENFORCE STATUTORY LIABILITY FOR CORPORATE DEBTS. — Where separate actions by creditors of corporations are permitted to enforce the statutory liability of stockholders for the corporate debts, it is a general rule that the creditor first suing thereby acquires a priority over other creditors with respect to the stockholder sued: Cook on Stock and Stockholders, sec. 228; Thompson's Liability of Stockholders, sec. 424; *Cole* v. *Butler*, 43 Me. 401; *Ingalls* v. *Cole*, 47 Id. 530, 541; *Jones* v. *Weltberger*, 42 Ga. 575; *Lowry* v. *Parsons*, 52 Id. 356; *Thebus* v. *Smiley*, 110 Ill. 316; and therefore a stockholder, after notice of such a suit, cannot defeat the suing creditor by paying the claims of other creditors to the extent of his liability: *Jones* v. *Weltberger*, *Cole* v. *Butler*, *Thebus* v. *Smiley*, *supra;* but in *City of Chicago* v. *Hall*, 103 Ill. 342, it was held that the mere institution of a suit at law by one of several creditors of

an insolvent bank to enforce the personal liability of a stockholder for the payment of his claim did not give him a prior right or lien on the fund, when collected, to the exclusion of all other creditors of the bank; and the fact that such creditor was prevented from obtaining final judgment in his suit by injunction on bill filed by other creditors made no difference; and in *State Savings Ass'n* v. *Kellogg*, 63 Mo. 540, it was also held that the institution of a suit against a stockholder for a corporate debt did not operate as a lien upon his liability, so as to hold him therefor against a senior judgment and execution obtained in another action commenced later; and see also *Marks* v. *Mulhall*, 13 Mo. App. 590; *Bittner* v. *Lee*, 25 Id. 559. But "when the proceeding to enforce the statutory liability is in equity, there can be, upon plain principles, no priority among creditors": Cook on Stock and Stockholders, sec. 228.

ACTIONS BY STOCKHOLDERS AGAINST OTHER STOCKHOLDERS — CONTRIBUTION. — It has already been observed that stockholders made individually liable for corporate debts are considered partners to such an extent that one stockholder who is also a creditor of the corporation cannot maintain an action at law against other stockholders: *Bailey* v. *Bancker*, 3 Hill, 188; 38 Am. Dec. 625; *Wait* v. *Ferguson*, 14 Abb. Pr. 379; *Beers* v. *Waterbury*, 8 Bosw. 396, 413; *Richardson* v. *Abendroth*, 43 Barb. 162; *Clark* v. *Myers*, 11 Hun, 608; *Thompson* v. *Meisser*, 108 Ill. 359; *Perkins* v. *Sanders*, 56 Miss. 733; compare *Woodruff etc. Iron Works* v. *Chittenden*, 4 Bosw. 406; and, at all events, even if the rule be not placed on this ground, there are inherent difficulties in the suit at law: See *Mathes* v. *Neidig*, 2 N. Y. 100, 104; *Garrison* v. *Howe*, 17 Id. 458, 463. But where a stockholder is thus a creditor, or where he has been compelled to pay more than his share of a debt of the corporation to a creditor, he has a claim for contribution in equity against the other stockholders, who are liable for the debt: *Beers* v. *Waterbury*, *Clark* v. *Myers*, *Perkins* v. *Sanders*, *supra*; *Judson* v. *Rossie Galena Co.*, 9 Paige, 598, 603; 38 Am. Dec. 569; *Aspinwall* v. *Torrance*, 1 Lans. 381; *Garrison* v. *Howe*, 17 N. Y. 458, 463; *Aspinwall* v. *Sacchi*, 57 Id. 331; *Mathes* v. *Neidig*, 72 Id. 100, 104; and see *Polk* v. *Reynolds*, 54 Ind. 449; *Ward* v. *Polk*, 70 Id. 309; Cook on Stock and Stockholders, sec. 229. He has, however, it is held, no right against another stockholder, under a statute making stockholders liable to creditors of the corporation to an extent equal to their unpaid subscriptions, while his own subscription remains unpaid: *Weber* v. *Fickey*, 47 Md. 196; *Franklin* v. *Menown*, 10 Mo. App. 570. So it has been held that a suit in equity for contribution, brought by a member of a corporation who had paid a debt of a corporation, against other members, cannot be maintained until the complainant had first applied and exhausted all property of the corporation: *Gray* v. *Coffin*, 9 Cush. 192. But in *Smith* v. *Londoner*, 5 Col. 365, it was decided that where a statute provided that the stockholders of a corporation "shall be severally individually liable to the creditors of the company in which they are stockholders, to the amount of unpaid stock held by them respectively, for all debts and contracts made by such company," a stockholder, who was also a creditor, but who had paid in full for his stock, and consequently was not individually liable for the debts of the company, might maintain an action at law against another stockholder, and recover to the amount of unpaid stock held by him. As to the right of a stockholder to enforce contribution under special statutes, see *Andrews* v. *Callender*, 13 Pick. 484; *Thayer* v. *Union Tool Co.*, 4 Gray, 75; *Potter* v. *Stevens Machine Co.*, 127 Mass. 592; 34 Am. Rep. 428; *Brinham* v. *Wellersburg Coal Co.*, 47 Pa. St. 43.

If a stockholder himself cannot proceed in a special way, provided by stat-

ute, against other stockholders, one to whom he has assigned his claim for the sole purpose of enforcing such liability stands in no better position: *Thayer* v. *Union Tool Co.*, 4 Gray, 75; *Potter* v. *Stevens Machine Co.*, 127 Mass. 592; 34 Am. Rep. 428; and see also *Richardson* v. *Abendroth*, 43 Barb. 162.

The liability for contribution is co-extensive with the liability for the debt; and therefore all persons who are so liable are proper contributors: *Sayles* v. *Bates*, 15 R. I. 342.

STOCKHOLDER'S RIGHT TO SET OFF DEBT DUE HIM BY CORPORATION IN ACTION TO ENFORCE HIS STATUTORY LIABILITY. — It has been heretofore shown that a stockholder cannot set off a debt due him by the corporation in a creditor's suit to compel the payment of his unpaid subscriptions. It would seem that a like rule should obtain in equitable actions against stockholders to enforce their statutory liability, where it is held that the statute creates a fund out of which the creditors are to be paid ratably: See Cook on Stock and Stockholders, sec. 227; 2 Morawetz on Corporations, sec. 898; also *In re Empire City Bank*, 18 N. Y. 119, 227; *Buchanan* v. *Meisser*, 105 Ill. 638; *Thompson* v. *Meisser*, 108 Id. 359; *Thebus* v. *Smiley*, 110 Id. 316; *Burnap* v. *Haskins Steam Engine Co.*, 127 Mass. 586; *Matthews* v. *Albert*, 24 Md. 527; compare *Briggs* v. *Penniman*, 8 Cow. 387; 18 Am. Dec. 454; but the cases are far from satisfactory; and in New York, in actions to enforce the liability of stockholders under the act of 1848, by which they are made "severally individually" liable to the creditors of the company to an amount equal to the amount of stock held by them respectively, it is held by recent cases that if the stockholder sued is himself a creditor of the corporation to an amount equal to his statutory liability, he may set up that fact as an equitable defense; but not where the amount of his claim is less than such liability: *Mather* v. *Neidig*, 72 N. Y. 100, 105; *Agate* v. *Sands*, 73 Id. 620; *Wheeler* v. *Millar*, 90 Id. 353. Thus, says Finch, J., in *Wheeler* v. *Millar*, *supra*: "If the stockholder sued is himself such creditor to an amount equaling his statutory liability, he has quite as good a right to the fund which is pursued as the pursuer. Indeed, he has the better right, because it is already in his possession, and it would be inequitable to take it from him for the benefit of another creditor who has no superior equity. But the stockholder must be really a creditor of the company. He must stand in a relation to it which in equity and justice is as strong as that of the assailant. . . . . But here the facts show that the stockholder is not a creditor when accounts are adjusted, and has no equity against the fund in his hands. He is bound first to pay his own debt to the company, and is in the end not its creditor at all. If, after paying his debt, the company still owed him, to the extent of that balance, he would have an equitable defense. But the balance is the other way. Equitably he is the debtor of the company, with his claim against it extinguished, and has nothing upon which to found an equitable claim against the statutory liability." See also *Remington* v. *King*, 11 Abb. Pr. 278. In Missouri, in the special statutory proceeding against a stockholder, he is allowed to offset a debt due him from the corporation: *Jerman's Adm'r* v. *Benton*, 79 Mo. 148; *Webber* v. *Leighton*, 8 Mo. App. 502; *Merchants' Ins. Co.* v. *Hill*, 12 Id. 148; but where an unsatisfied judgment in favor of a stockholder and against the corporation has been allowed as a set-off in a former proceeding by another creditor against such stockholder, this cannot avail in a subsequent proceeding against him, such judgment having been in the mean time satisfied: *Simmonds* v. *Heman*, 17 Id. 444. And in Georgia, applying the principle that a stockholder may reduce or discharge

his proportionate individual liability by payment to one creditor before suit brought by another, it is held that a *bona fide* debt of a stockholder against the corporation may be set off by him in a suit to enforce his liability: *Boyd* v. *Hall*, 56 Ga. 563.

ESTOPPELS IN ACTIONS TO ENFORCE STATUTORY LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS.—As in the case of creditor's suits to compel the payment of unpaid subscriptions by stockholders, in actions to enforce their statutory liability for the corporate debts, they are estopped from denying that the corporation was legally organized: *Corwith* v. *Culver*, 69 Ill. 502; *Wheelock* v. *Kost*, 77 Id. 296; *McCarthy* v. *Lavasche*, 89 Id. 270; 31 Am Rep. 83; *Shafer* v. *Moriarity*, 46 Ind. 9; *Hager* v. *Cleveland*, 36 Md. 476; *Hammond* v. *Straus*, 53 Id. 1, 15; *Eaton* v. *Aspinwall*, 19 N. Y. 119; *Abbott* v. *Aspinwall*, 26 Id. 202; *Aspinwall* v. *Sacchi*, 57 Id. 331; *Perkins* v. *Hatch*, 4 Hun, 137; *McHose* v. *Wheeler*, 45 Pa. St. 32; *Slocum* v. *Providence Steam etc. Co.*, 10 R. I. 112; *Keyser* v. *Hitz*, 2 Mackey, 473; *Casey* v. *Galli*, 94 U. S. 673; and where an attempt has been made to increase the capital stock of a corporation, stockholders who have voted for the increase, accepted their share of the additional stock, and received dividends thereon, as against creditors are estopped from questioning the validity of the increase to escape their individual liability: *Veeder* v. *Mudgett*, 95 N. Y. 295.

STATUTE OF LIMITATIONS IN ACTIONS TO ENFORCE STOCKHOLDER'S STATUTORY LIABILITY.—Where the liability of a stockholder is immediate and primary, and not contingent upon obtaining a judgment against the corporation, the statute of limitations plainly begins to run against the stockholder at the same time it begins to run against the corporation: Cook on Stock and Stockholders, sec. 227; *Mitchell* v. *Beckman*, 64 Cal. 117; *Stillphen* v. *Ware*, 45 Id. 116; and see *Conklin* v. *Furman*, 57 Barb. 484; 8 Abb. Pr., N. S., 161, affirmed in 48 N. Y. 527; but where a creditor is first obliged to obtain a judgment on his claim against the corporation, and have an execution issued thereon and returned unsatisfied, the statute does not begin to run in favor of a stockholder until the return of the execution: Cook on Stock and Stockholders, sec. 227; *Handy* v. *Draper*, 89 N. Y. 334; and see *Shellington* v. *Howland*, 53 Id. 371. Where the individual liability of stockholders arose under the charter, "upon failure of the bank," the liability gave at once the right to sue, and consequently the statute began to run at the same time: *Carrol* v. *Green*, 92 U. S. 509, 511; and see *Godfrey* v. *Terry*, 97 Id. 171; *Terry* v. *McLure*, 103 Id. 442.

The liability of the stockholder has been held to be a liability "created by law," within the meaning of a section of the statute of limitations: *Green* v. *Beckman*, 59 Cal. 545; *Moore* v. *Boyd*, 15 Pac. Rep. 670 (Cal.); *Hawkins* v. *Furnace Co.*, 40 Ohio St. 507; and to be a debt grounded upon a "contract without specialty": *Terry* v. *Calnan*, 13 S. C. 220; *Carrol* v. *Green*, 92 U. S. 509; and a debt "founded on specialty": *Atwood* v. *Rhode Island Agricultural Bank*, 1 R. I. 376; *Bullard* v. *Bell*, 1 Mason, 243; but not a liability upon a "statute" for a "forfeiture": *Corning* v. *McCullough*, 1 N. Y. 47; 49 Am. Dec. 287; overruling *Freeland* v. *McCullough*, 1 Denio, 412; 43 Am. Dec. 685; and holding that the only limitation provided for a suit against a stockholder was six years, within which actions of account, *assumpsit*, or on the case founded on any contract or liability, express or implied, are to be commenced; but see *Lawler* v. *Burt*, 7 Ohio St. 340; and compare *Gridley* v. *Barnes*, 103 Ill. 211.

STOCKHOLDER'S DISCHARGE IN BANKRUPTCY AS AFFECTING STATUTORY LIABILITY FOR CORPORATE DEBTS.—A discharge in bankruptcy releases a shareholder of a national bank from his statutory liability to creditors of the bank, where, at the time of his discharge, the claims of the creditors were prov-

able, and not merely contingent: *Irons* v. *Manufacturers' Nat. Bank*, 27 Fed. Rep. 591; 17 Id. 308. But it is otherwise held, the liability of stockholders for the debts of the corporation is not a "debt" which can be proved against their estates in insolvency: *Kelton* v. *Phillips*, 3 Met. 61; *Bangs* v. *Lincoln*, 10 Gray, 600.

STATE *v.* NEVIN.

[19 NEVADA, 162.]

PUBLIC OFFICERS WHO ARE INTRUSTED WITH PUBLIC FUNDS, and required to give bonds for the faithful discharge of their official duties, are not mere bailees of the money, to be exonerated by the exercise of ordinary care and diligence. Their liability is fixed by their bonds; and the fact that money is stolen from them, without any fault or negligence upon their part, does not release them from liability thereon.

BOND REQUIRING FAITHFUL PERFORMANCE OF OFFICIAL DUTY IS AS BINDING upon the principal and his sureties as if all the statutory duties of the officer were inserted in it.

COUNTY TREASURER IS REQUIRED TO SAFELY KEEP PUBLIC MONEY, by the Compiled Laws of Nevada, and pay it out only as provided by law.

STATE IS NOT COMPELLED TO WAIT UNTIL CLOSE OF COUNTY TREASURER'S TERM OF OFFICE before commencing an action upon his bond, where he admits the defalcation, and claims the right to interpose the defense of a robbery of the funds.

ACTION against the county treasurer and his sureties upon his official bond. The facts are stated in the opinion.

W. E. F. Deal and William Woodburn, for the appellants.

W. H. Davenport, attorney-general, and J. A. Stephens, district attorney, for the respondent.

By Court, HAWLEY, J. This action was brought against the county treasurer of Storey County, and the sureties upon his official bonds, to recover an amount of money admitted to be deficient in the accounts of the county treasurer. The answer alleges that the money was forcibly taken by robbers from the treasurer and carried away by irresistible force, "without any fault or negligence or want of reasonable care or diligence in the preservation and care of said sum of money, so that said sum of money was entirely lost to the treasury of said county, and no part thereof has ever been recovered." The district court sustained a demurrer, which was interposed to this answer, upon the ground that the facts stated did not constitute any defense to the cause of action.

Was this ruling of the court correct? The conditions named in the official bonds "is such that if the above-bounden Den-

nis Novin shall well and truly and faithfully perform and execute the duties of treasurer of the county of Storey now required of him by law, and shall well, truly, and faithfully execute and perform all the duties of such office of treasurer required by any law to be enacted subsequently to the execution of this bond, then this obligation to be void and of no effect; otherwise to be and remain in full force and effect." Appellant insists that his responsibility under this contract is simply that which the common law imposes upon a bailee for hire; that he is not in any sense an insurer of the moneys in his custody, and should not be held responsible for the money that was stolen from him, and taken by the use of irresistible force, without any negligence or fault or want of care on his part. The great weight of the authorities upon this subject are adverse to the views contended for by appellant. The general rule upon this subject is to the effect that public officers who are intrusted with public funds, and required to give bonds for the faithful discharge of their official duties, are not mere bailees of the money, to be exonerated by the exercise of ordinary care and diligence; that their liability is fixed by their bond; and that the fact that money is stolen from them without any fault or negligence upon their part does not release them from liability on their official bonds.

Recognizing the almost universality of this rule, appellant contends that the decisions against him are founded upon the peculiar wording of the bonds, or provisions of the statute, to the effect that the officer shall safely keep and pay over all moneys coming into his hands. It is true that in *United States* v. *Prescott*, 3 How. 588, *Commonwealth* v. *Comly*, 3 Pa. St. 374, *State* v. *Harper*, 6 Ohio St. 610, 67 Am. Dec. 363, *Inhabitants of Hancock* v. *Hazzard*, 12 Cush. 112, 59 Am. Dec. 171, and other cases, considerable stress is placed upon this language in the bond. Thus in *United States* v. *Prescott*, *supra*, the court said: "The condition of the bond has been broken, as the defendant, Prescott, failed to pay over the money received by him when required to do so; and the question is, whether he shall be exonerated from the condition of his bond, on the ground that the money had been stolen from him. The objection to this defense is, that it is not within the condition of the bond, and this would seem to be conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the government. How, then, can Prescott be discharged from his bond? He knew the extent of his obligation when he

entered into it, and he realized the fruits of this obligation by the enjoyment of the office. Shall he be discharged from liability contrary to his own express undertaking? There is no principle upon which such a defense can be sustained. The obligation to keep safely the public money is absolute, without any condition, express or implied; and nothing but the payment of it, when required, can discharge the bond."

But there are an equal or greater number of cases like *Muzzy* v. *Shattuck*, 1 Denio, 233, *District T.* v. *Morton*, 37 Iowa, 550, *Inhabitants* v. *McEachron*, 33 N. J. L. 340, *Boyden* v. *United States*, 13 Wall. 17, and *State* v. *Moore*, 74 Mo. 413, 41 Am. Rep. 322, where the condition of the bond, like the one under consideration here, is for the faithful performance of the official duties, and the conclusions of the courts are substantially the same as announced in *United States* v. *Prescott*, *supra*. It is apparent that a bond requiring a faithful performance of official duty is as binding upon the principal and his sureties as if all the statutory duties of the officer were inserted in the bond.

In Indiana, the statutory conditions in the bond are the same as required by the laws of this state. In *Halbert* v. *State*, 22 Ind. 130, the treasurer's bond was, however, conditioned not only for the faithful performance of his duties as the statute required, but also that he should "pay over all moneys according to law that might come into his hands as such treasurer."

The court said: "It is objected that the latter branch of the condition was unauthorized by law, and therefore of no effect. But if the condition for the faithful performance of his duties includes the paying over, according to law, of all moneys that might come into his hands as such treasurer, nothing is added to the legal effect of the bond by the latter branch of the condition. An examination of the various statutes bearing on the question shows clearly enough that one of the duties of a county treasurer is to pay over according to law all moneys that come into his hands as such treasurer; hence we shall consider the case as if the bond had been conditioned simply for the faithful performance of the duties of the office."

In *Boyden* v. *United States*, 13 Wall. 24, the court, referring to *United States* v. *Prescott*, 3 How. 587, said: "The condition of the receiver's bond in that case, it is true, was that the receiver should pay promptly when orders for payment should be received, while the bond in the case before us is conditioned that Boyden, the receiver, had truly executed and discharged,

and should continue truly and faithfully to execute and discharge, all the duties of said office according to law. But the acts of Congress respecting receivers made it their duty to pay the public money received by them when ordered by the treasury department. . . . . The bond, therefore, was an absolute obligation to pay the money, and differing not at all in legal effect from the bond in Prescott's case."

What are the duties of a county treasurer under the statutes of this state? In addition to requiring an oath and an official bond it is, among other things, provided that the county treasurer "shall receive all moneys due and accruing to his county, and disburse the same on the proper orders issued and attested by the county auditor": 2 Comp. Laws, sec. 2981. "He shall so arrange and keep his books that the amount received and paid out . . . . shall be exhibited in separate accounts, as well as the whole receipts and expenditures by one general account": 2 Comp. Laws, sec. 2984. "He shall at all times keep his books and office subject to the inspection and examination of the board of county commissioners, and shall exhibit the money in his office to such board at least once a year, and as often as such board may require": 2 Comp. Laws, sec. 2985. "He shall annually make complete settlements with the board of county commissioners, ... and shall, at the expiration of his term of office, deliver to his successor all public moneys, books, and papers in his possession": 2 Comp. Laws, sec. 2991.

He shall assist the county auditor and county commissioners in counting the money in his office, so that they may "determine whether the funds, securities, and property of the county are all on hand": Stats. 1881, sec. 21. Under these provisions, is it not manifest that it is the duty of county treasurers to safely keep the public money and pay it out only as provided by law? The fact that the county treasurer is required "to receive money, and enter it in his cash-book, implies, without any other special regulation, that he is to keep it; and being required to keep it, it follows that he is to keep it safely. This is one of the duties of his office he has undertaken faithfully to discharge": *Thompson* v. *Trustees*, 30 Ill. 101. Unless he safely keeps it, he could not exhibit it to the commissioners as required by law, and it could not be counted. Neither could he deliver it to his successor in office. The duty to safely keep the money is made absolutely clear by the provisions of the statute already quoted and referred to. But there are also other provisions which are equally as strong and cogent. If

any officer charged with the safe-keeping of public money converts the same to his own use, or loans any portion of such money, he shall be guilty of embezzlement: Stats. 1881, sec. 82; Stats. 1883, sec. 96. Could a county treasurer who converts the money to his own use claim that he is not an officer who is charged with the safe-keeping of the public money? It would be a stigma upon the law and a disgrace to the judiciary to say that he could successfully maintain such a defense. The statutes of this state in relation to the duties of county treasurers are almost identical with those of Indiana. The supreme court of that state in *Halbert* v. *State*, *supra*, after quoting the statutory provision, said: "By these various provisions it is clearly seen that it is the duty of a county treasurer to pay over the funds in his hands according to law, which may be upon orders drawn upon him by the auditor, or to his successor in office, and a failure to make such payment constitutes a breach in his bond, conditioned for the faithful performance of his duties," and declare that the fact that the money was stolen from the treasurer without his fault did not relieve him from the necessity of discharging the obligation imposed upon him by his bond. This decision was followed in the subsequent cases of *Morbeck* v. *State*, 28 Ind. 86, *Rock* v. *Stinger*, 36 Id. 348, and *Linville* v. *Leininger*, 72 Id. 494.

In Iowa, where the statute is not as strong as in this state, the same doctrine is held and applied to an officer upon a bond conditioned for the performance of his duties "to the best of his abilities": *District Tp.* v. *Smith*, 39 Iowa, 9; 18 Am. Rep. 39. The statutes of this state are more stringent than the statutes of Ohio, except in relation to the conditions of the bond. In *State* v. *Harper*, 6 Ohio St. 610, 67 Am. Dec. 363, the court said: "By accepting the office, the treasurer assumes upon himself the duty of receiving and safely keeping the public money, and of paying it out according to law. His bond is a contract that he will not fail, upon any account, to do those acts. It is, in effect, an insurance against the delinquencies of himself, and against the faults and wrongs of others in regard to the trust placed in his hands. He voluntarily takes upon himself the risks incident to the office, and to the custody and disbursement of the money. Hence it is not a sufficient answer, when sued for a balance found to have passed into his hands, to say that it was stolen from him; for even if the larceny of the money be shown to be without his fault, still, by the terms of the law and of his contract, he is bound to make good any

deficiency which may occur in the funds which come under his charge."

We deem it unnecessary, upon this branch of the case, to specially refer to the numerous other authorities where the same doctrines are announced, as it is absolutely clear from those already cited that the distinction sought to be maintained by appellant, that the conditions of the bond and the provision of the statute of this state should be construed differently from the construction given in the decided cases, cannot be maintained. In many of the cases, the courts have given as an additional reason for their conclusions that a public officer cannot set up the defense of a robbery of the public funds in their possession. Thus in *United States* v. *Prescott*, *supra*, Justice McLean, in delivering the opinion of the court, said: "The liability of the defendant, Prescott, arises out of his official bond, and principles founded upon the public policy."

After discussing Prescott's liability upon the bond, he adds: "Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that he should keep safely the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs so as to establish his loss without laches on his part. Let such a principle be applied to our postmasters, collectors of customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public?"

In *Commonwealth* v. *Somly*, *supra*, Gibson, C. J., in delivering the opinion of the court, said: "The opinion of the court in the case of *United States* v. *Prescott* is founded on sound policy and sound law. . . . . The keepers of the public moneys, or their sponsors, are to be held strictly to the contract, for if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would be incessant."

To the same effect are the decisions in *District Township* v. *Morton*, 37 Iowa, 553; *United States* v. *Watts*, 1 N. Mex. 562; *Commissioners of Jefferson Co.* v. *Lineberger*, 3 Mont. 231; 35 Am. Rep. 462. The only defenses recognized by any of the authorities of the United States at the present time, with the exception of *Cumberland Co.* v. *Pennell*, 69 Me. 357, 31 Am. Rep. 284, for the failure of a public officer charged with

the safe-keeping of the public funds to pay over the same is where he is prevented from doing so by the act of God or the public enemy, without any neglect or fault on his part. We say the Maine case stands alone in its opposition to what it is pleased to term the new-born policy of the law. In that case, some reliance seems to have been placed upon the case of *Supervisors of Albany* v. *Dorr*, 25 Wend. 440, but the principles of that case were repudiated in *Muzzy* v. *Shattuck*, *supra*, and hence we are authorized to say that the case in Maine is unsustained by any other recognized authority in any of the courts of the United States, federal or state.

In *United States* v. *Thomas*, 15 Wall. 341, it was held that the act of a public enemy in forcibly seizing or destroying property in the hands of a public officer, against his will, and without his fault, is a discharge of his obligations to keep such property safely, and of his official bond, given to secure the faithful performance of that duty, and to have the property forthcoming when required. Bradley, J., in delivering the opinion of the court, questions the correctness of some of the extreme views stated in some of the authorities referred to, and claims that broader language was used than was necessary where the defense set up was that the money was stolen, and says that "a much more limited responsibility" than was indicated by the language in Prescott's case, *supra*, "would have sufficed to render that defense nugatory." But there is no declaration of any legal principle contained in this opinion that would justify a court in permitting such a defense as was sought to be interposed in this case. It is said that public officers are bailees, "but they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility."

In *United States* v. *Humason*, 6 Saw. 201, the court permitted the defense that the officer with the money was on a steamship which was lost at sea, and the officer drowned, and the money lost in the Pacific Ocean. The doctrines announced in that case are similar to the case of *United States* v. *Thomas*, 15 Wall. 338, and do not in any manner militate against the general views we have expressed.

In *State* v. *Moore*, *supra*, the defendant, who was county treasurer, answered that he ought not to be held upon his bond because Mississippi County, "being overrun with tramps, thieves, robbers, public enemies, the money could not be safely

kept in said county," and that, for the purpose of keeping it safely, he deposited it to his credit as treasurer in a bank in St. Louis, which failed, whereby the money was wholly lost. The court said:—

"Such an answer as this, we think, is insufficient to shield defendant from liability, in any view which can be taken of the case. If the obligation assumed by defendant in his bond, to deliver over to his successor in office all money belonging to the county, can only be met or discharged by making such delivery or payment, it is clear that the facts set up in the answer, and admitted to be true, constitute no defense. That the above rule is the correct one governing in such cases, is established by the following authorities"; citing *State* v. *Powell*, 67 Mo. 395, and the various decisions of the supreme court of the United States. "If, on the other hand, under the rule laid down in the case of *United States* v. *Thomas*, 15 Wall. 337, defendant is to be regarded as a bailee, and exempt from liability to pay when the loss is occasioned by the act of God or a public enemy, he would still be liable under the facts stated in the answer, because they show that the loss was not occasioned in either of these ways. The tramps, thieves, and robbers which it is alleged overrun Mississippi County, while they are enemies to the peace and safety of the public and social order, they are not public enemies in the legal sense of these words. By enemies is to be understood public enemies with whom the nation is itself at open war; and not merely robbers, thieves, and other private depredators, however much they may be deemed, in a moral sense, at war with society. Losses, therefore, which are occasioned by robbery on the highway, or by the depredations of mobs, rioters, insurgents, and other felons, are not deemed losses by enemies within the meaning of the exception."

The action of the district court in sustaining the demurrer to the answer was correct.

The other positions taken by appellant relative to the time when the cause of action could be commenced are wholly untenable. Having admitted the defalcation, and claimed the right to interpose the defense inserted in his answer, the state was not compelled to wait until the close of appellant's term of office before commencing an action upon his bond.

The judgment of the district court is affirmed.

PUBLIC TREASURER OR COLLECTOR IS LIABLE ON HIS OFFICIAL BOND FOR MONEY STOLEN WITHOUT HIS FAULT: *Inhabitants of Hancock* v. *Hazzard*, 50

Am. Dec. 171, and note; *State* v. *Harper*, 67 Id. 363, and note discussing the extent of his liability; *Commissioners of Jefferson County* v. *Lineberger*, 35 Am. Rep. 462; *State* v. *Houston*, 56 Id. 59, and note; *contra: Cumberland Co.* v. *Pennell*, 31 Id. 284; or for money consumed by fire: *District Township of Union* v. *Smith*, 18 Id. 39; or lost by the failure of a bank in which he deposited the money: *State ex rel. Township* v. *Powell*, 29 Id. 512; *Lowry* v. *Polk County*, 33 Id. 114; *Ward* v. *School District*, 35 Id. 477; *State* v. *Moore*, 41 Id. 322; *contra: York County* v. *Watson*, 40 Id. 675. See further, on the point that the treasurer is a debtor and not a bailee of the public moneys, *Perley* v. *County of Muskegon*, 20 Id. 637; *Shelton* v. *State ex rel. Commissioners of Morgan County*, 21 Id. 197.

THOMPSON *v.* RENO SAVINGS BANK.

[19 NEVADA, 171.]

CREDITOR OF CORPORATION NEED NOT ENDEAVOR TO INDUCE IT TO MAKE CALL before instituting suit against a subscriber to its capital stock to compel the payment of his unpaid subscription.

STATUTE OF LIMITATIONS IS NOT AVAILABLE AS DEFENSE TO SUIT BY CREDITOR OF CORPORATION AGAINST SUBSCRIBER TO CAPITAL STOCK to compel the payment of his unpaid subscription, where the statute has not been set in motion by some adverse action, such as a call by the corporation, or if, perhaps, set in motion by the insolvency of the corporation, where sufficient time has not elapsed when suit was commenced to bar a recovery.

SUIT in equity by William Thompson, a judgment creditor of the Reno Savings Bank, a corporation, against the bank and G. W. Huffaker, to compel the payment by Huffaker of his unpaid subscription to the capital stock of the bank. The opinion states the case.

William Webster and S. D. King, for the appellant.

John F. Alexander, for the respondent.

By Court, BELKNAP, C. J. This is a suit in equity brought by respondent, a judgment creditor of the Reno Savings Bank, against appellant Huffaker, to recover the amount of his unpaid subscription to the capital stock of the bank. The suit is based upon facts corresponding in all essential respects with those in *Thompson* v. *Reno Savings Bank*, *ante*, p. 797, and the decision in that case, in so far as it is applicable, will be treated as decisive of this one, without further notice.

The first objection which we are asked to consider is that the complaint does not state a case entitling the plaintiff to sue. It is urged that subscriptions to the capital stock of the corporation are payable upon a call of the company, and that

a creditor, to maintain a suit of this nature, must, before instituting it, make an effort to induce the corporation to make the call, and that no proper effort in this behalf has been made. In support of this view, we are referred to a number of cases holding that a stockholder or creditor of a corporation may, under certain circumstances, and to prevent a failure of justice, institute and control a suit in his own name involving the rights of the corporation, if it has refused to take action. In this class of cases, the right of action is primarily in the corporation, and it is entitled to the fruits of the litigation; but the stockholder or creditor is allowed to sue in order to protect the rights or property in which he has an interest. The principle involved in these cases has no application to cases of the nature of the one at bar, which is of the nature of a creditor's bill, brought by a plaintiff entitled in his own right to the relief which the judgment affords.

Another objection arises upon the order of the district court overruling the defense interposed of the statute of limitations. Appellant's subscription to the stock was made in the month of April, 1876, and it is said that a recovery thereon was barred within four years thereafter. The statutes relating to corporations provide that the by-laws may prescribe the times, manner, and amounts in which payments of subscriptions to the capital stock may be made. If the by-laws make no provision of this nature, and none was made by the by-laws of the bank, the trustees have power to require payment of such installments as they may deem proper: Comp. Laws, sec. 8398. The trustees of the bank, being subscribers to its capital stock, availed themselves of the privilege afforded by the statute, and made no call except thirty per cent of the amount subscribed at the commencement of business operations. No action has ever been taken by them to recover any portion of the remaining seventy per cent of the subscribed capital. This unpaid amount was a part of the capital of the bank allowed to remain in reserve in the hands of the stockholders, but subject to call when needed. It was a continuing liability of the subscribers, which neither the indulgence of the trustees nor mere lapse of time could defeat. The statute of limitations is not available as a defense, because it has not been set in motion by any adverse action, such as a call by the corporation upon appellant to pay his subscription.

If the insolvency of the corporation set the statute in motion, sufficient time had not elapsed when this suit was com-

menced to bar a recovery: *Allibone* v. *Hager*, 46 Pa. St. 48; *Curry* v. *Woodward*, 53 Ala. 371; *Harmon* v. *Page*, 62 Cal. 448; Thompson's Liability of Stockholders, secs. 290, 291.

The judgment and order of the district court are affirmed.

LIABILITY OF STOCKHOLDERS TO CREDITORS OF CORPORATIONS FOR CORPORATE DEBTS: See this subject discussed in *Thompson* v. *Reno Savings Bank*, *ante*, p. 797, and note; *Thompson* v. *Reno Savings Bank*, *infra*.

THOMPSON *v.* RENO SAVINGS BANK.

[19 NEVADA, 242.]

CREDITOR OF CORPORATION MAY MAINTAIN SUIT AGAINST PERSONAL REPRESENTATIVES OF DECEASED SUBSCRIBER TO CAPITAL STOCK to compel the payment of the unpaid subscription of the decedent without presenting the claim to the representatives for allowance, as ordinary claims are required to be presented by the Compiled Laws of Nevada.

VARIANCE BETWEEN PLEADINGS AND PROOFS IS IMMATERIAL, where suit is brought by a creditor of a corporation against the defendants, as subsubribers to the capital stock, to compel the payment of their unpaid subscriptions; but the agreement established is an implied rather than an express agreement, by which the defendants deposited a certain sum of money with the corporation as its business capital, and agreed among themselves not to be liable for any further amount.

SUIT IN EQUITY CAN BE MAINTAINED BY CREDITOR OF CORPORATION AGAINST SUBSCRIBER TO CAPITAL STOCK to compel the payment of his unpaid subscription, without procuring, or attempting to procure, a formal call to be made; and when the creditors are numerous, and a court of law is incapable of adjusting their rights, relief can only be had in equity.

SUIT in equity by William Thompson, a judgment creditor of the Reno Savings Bank, a corporation, against the bank, L. L. Crockett, and others, to compel the payment by the individual defendants of their unpaid subscriptions to the capital stock of the bank. The opinion states the case.

Clarke and King, for the appellants.

John F. Alexander, for the respondent.

By Court, BELKNAP, C. J. This is a suit in equity to recover the amount of unpaid subscriptions to the capital stock of the Reno Savings Bank. Two of the defendants are representatives of deceased persons. They object to the proceedings because of the admitted failure of respondent to comply with the requirements of the probate law in the matter of the presentation for allowance of the demands sued upon.

The law requires (Comp. Laws, sec. 611) "if a claim be not presented within ten months after the first publication of notice, it shall be barred forever," unless certain exceptions exist, immaterial here. Again (sec. 618): "No holder of any claim against an estate shall maintain any action thereon unless the claim shall have been first presented to the executor or administrator." Courts of equity uniformly regard the unpaid capital stock of a corporation as a trust fund, held in reserve by the stockholders for the benefit of the creditors. The stockholders are trustees of the creditors, and suits to establish and enforce the trust are maintained against the representatives of deceased persons, upon the theory that the decedent held money equal to the amount of his unpaid subscription in trust for the creditors, and that the fund, although incapable of identification, has passed into the hands of the executor or administrator. Such a fund is properly no part of the estate of a deceased person. The deceased stockholders were trustees, and not debtors, of the bank's creditors. No necessity therefore existed for the presentation of any demand before commencing suit: *Gunter* v. *Janes*, 9 Cal. 643.

The bill proceeds upon the ground of an indebtedness arising out of a subscription by the defendants to the capital stock. The testimony shows that no express agreement was made to take any portion of the capital stock of the bank, but that the defendants L. L. Crockett, James H. Kinkead, R. H. Crocker, deceased, and others, deposited thirty thousand dollars with the bank as its business capital, and agreed among themselves and the bank that they should not be liable for the payment of any further amount of money for the purposes of the bank. Upon these facts, it is said that a fatal variance exists between the pleadings and proof. The agreement established was an implied rather than an express agreement. The variance was immaterial, and could not have misled the defense: *Smith* v. *Lippincott*, 49 Barb. 398. Moreover, the decree may be sustained upon the ground that the answers of the defendants set forth, by way of defense, the facts above stated as having been introduced in evidence. The relief granted is therefore within the issue made and litigated: 1 Comp. Laws, sec. 1211. Objection is also made to the remedy awarded. It is said that if plaintiff is entitled to any relief, it is by assessment to be levied by the trustees upon all of the stockholders, as contemplated by the by-laws of the bank.

The authorities are uniformly opposed to this suggestion. In *Hatch* v. *Dana*, 101 U. S. 215, the court said: "In the English courts, a *mandamus* is sometimes awarded to compel the directors to make the necessary calls, ... but this remedy can avail only where there are directors. The remedy in equity is more complete, and it is well recognized: *Ward* v. *Griswoldville M. Co.*, 16 Conn. 593. In such cases it is nowhere held, so far as we know, that a formal call must be made before a bill can be filed. Indeed, the filing of the bill is equivalent to a call."

And in *Dalton etc. R. R. Co.* v. *McDaniel*, 56 Ga. 191, upon a similar objection, it was ruled that "principle and sound reason accord with authority that equity will grant relief in all such cases."

But an assessment upon the stockholders would be wholly inadequate in the present case. The answer avers that the bank is indebted to a great number of persons in large amounts. Each creditor was entitled to participate ratably with the plaintiff in the fund, and no creditor could be allowed to satisfy his debt to the exclusion of another. If the fund fell short of the amount of the debts of the bank, a court of law would be incapable of adjusting the rights of the creditors. This can be done in equity only.

Further objection is made to the amount of money required to be paid by the defendants under the decree. Plaintiff recovered a judgment at law against the bank for the sum of $31,528.38, with interest and costs. The aggregate amount of the judgments against the defendants in the present suit is thirty-nine thousand nine hundred dollars, and other judgments have been rendered in kindred suits aggregating nineteen thousand two hundred dollars. It is said that the effect of the decree is to require the defendants to pay a sum of money to the plaintiff largely in excess of the amount due him from the bank. An examination of the decree will show that the money to be paid under it is to be paid into the district court as a trust fund for the benefit of the creditors of the bank, to be distributed proportionately among them; that the amounts respectively received are to be credited upon the indebtedness of the bank to each creditor, and the liability of the bank therein discharged to the amount such creditor may receive. The decree is unobjectionable. The district court could not have anticipated payments under the decrees rendered in favor of the plaintiff in the other suits, and no sug-

gestion of that nature was made to it. This and the other suits were brought for the purpose of collecting a fund to be applied ratably to the satisfaction of judgments at law, recovered against the bank, and duly presented to the court below, by the creditor, for participation. The decrees in all of these suits are framed with this object in view.

The record contains many exceptions to the rulings of the court in admitting and excluding evidence. We shall not consider them, because, upon the facts heretofore referred to, as contained in the answer, in connection with the testimony of defendant James H. Kinkead, fixing the proportionate liability of each of the defendants, the decree is, in any event, correct. The rulings in *Thompson* v. *Reno Savings Bank, ante*, p. 797, are decisive of the other points.

The decree and order of the district court are affirmed.

LIABILITY OF STOCKHOLDERS TO CREDITORS OF CORPORATIONS FOR CORPORATE DEBTS. — See *Thompson* v. *Reno Savings Bank, ante*, p. 797, and note discussing the subject; *Thompson* v. *Reno Savings Bank, ante*, p. 881.

REINHART *v.* BRADSHAW.

[19 NEVADA, 255.]

TENANT IN COMMON CANNOT ACQUIRE RIGHT OF HOMESTEAD TO GOVERNMENT LAND of which he is in possession for himself and his co-tenants.

EJECTMENT. The facts are stated in the opinion.

W. E. F. Deal, and MacMillan and Hannah, for the appellants.

R. M. Clarke and M. S. Bonnifield, for the respondent.

By Court, BELKNAP, C. J. The parties hereto were tenants in common of the tract of land in controversy. At the time plaintiffs acquired their interest, defendant was residing upon the premises. In consideration of his occupancy, and of the use of certain farming implements and horses owned by the parties as tenants in common, and of other matters immaterial here, defendant agreed to cultivate the land and return plaintiffs one fourth of the crop of grain grown thereon. Under this agreement, defendant occupied and cultivated the land for two seasons, and engaged to do so for a third; but during the third season, and on or about the thirty-first day of July, 1882, plaintiffs learned from defendant, for the first time, that

his cultivation of the land was not for their use or benefit, as during the preceding seasons, and that he had, on the twenty-first day of January preceding, preferred a claim to the land under the homestead laws of the United States. Upon these facts plaintiffs brought the present action of ejectment. Defense is made upon the homestead claim.

The case presents but a single point: Was the land subject to pre-emption? In other words, can a tenant in common acquire a right of homestead to government land of which he is in possession for himself and his co-tenants?

In *Nickals* v. *Winn*, 17 Nev. 188, the plaintiff was in the possession of a large tract of the public land. He neglected to avail himself of his right to purchase in preference to others, and Winn, taking advantage of the situation, undertook to purchase one hundred and sixty acres thereof from the government. It was held, upon the authority of *Atherton* v. *Fowler*, 96 U. S. 513, and other decisions referred to in the opinion, that the right of pre-emption could not be exercised upon land occupied by another. "The generosity by which Congress gave the settler the right of pre-emption," said the court in that case, "was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land, — to make improvements on unimproved land. To erect a dwelling-house did not mean to seize another man's dwelling. It had reference to vacant land, — to unimproved land, — and it would have shocked the moral sense of the men who passed these laws if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides, and other crimes of less moral turpitude."

The present action is sought to be distinguished from *Atherton* v. *Fowler*, *supra*, and kindred cases, upon the ground that the defendant was not personally in the actual possession of the premises at the time of the eviction. The parties being tenants in common, the possession of the defendant was for the benefit of his co-tenants as well as himself. Occupied lands are exempted from the provisions of the pre-emption laws, upon the presumption that Congress could not have intended to invite the disorder and violence which would follow

the invasion of homes made by settlers upon the public lands. The evils against which the rule is directed are subject to occur where lands are held by such a constructive occupancy as the facts of this case present, and we think it falls within the principle ruled in the class of decisions upon which *Nickals* v. *Winn*, *supra*, is based.

Counsel for appellant has referred us to the case of *Emerson* v. *Sansome*, 41 Cal. 552, as opposing this view. That case was decided before the decision in *Atherton* v. *Fowler*, *supra*, established the contrary doctrine.

The judgment of the district court must be reversed, and the cause remanded, with instructions to enter a judgment in favor of the plaintiffs for the possession of the demanded premises with the defendant, as tenants in common, and for costs. It is so ordered.

PRE-EMPTORS, RIGHTS OF: See *Tyler* v. *Green*, 87 Am. Dec. 130, and note discussing the subject.

SCHULZ *v.* SWEENY.

[19 NEVADA, 359.]

WATER DISCHARGED FROM ARTIFICIAL INTO NATURAL CHANNEL, as a matter of convenience, and without any intention to reclaim it, is abandoned, and becomes a part of the natural stream, and subject to the same rights as the water naturally flowing therein.

DECREE WILL NOT BE REVERSED FOR AN ERROR IN IT, which works no injury to the losing party.

ACTION involving the right to certain water. The facts are stated in the opinion.

A. C. Ellis and William M. Stewart, for the appellant.

Clarke and King, for the respondent.

By Court, BELKNAP, C. J. Defendant, by means of a dam and ditch, constructed above the lands of plaintiff, diverted therefrom the waters of Lake View Cañon. These waters are produced by rains and melting snows, and, collecting in a channel, are increased by subterranean currents cut by tunnels driven into the mountains for that purpose. The body of water thus formed finds its way during a portion of the irrigating season by the channel, and through the depressions of Eagle Valley, first to the lands of the plaintiff, and afterwards to the lands of the defendant. At times during the summer

months the volume of water is materially increased by the water of a wood-flume operated by a corporation known as the Sierra Nevada Wood and Lumber Company. The water of the flume forms a part of that appropriated by the Virginia and Gold Hill Water Company, also a corporation, organized for the purpose of supplying the inhabitants of the towns of Virginia City and Gold Hill with water for domestic and other purposes. This company acquires the control of a supply of water in the Sierra Nevada Mountains, presumably by reservoirs, aqueducts, and such other appliances as are employed by companies having a similar purpose. A portion of this water is conducted into the flume of the wood company for the purpose of carrying wood from the mountains to the terminus of the flume at the head of Lake View Cañon. The water, after being thus used, is incapable of being conveyed by pipes to the localities where the water company is engaged in furnishing water, and it is therefore discharged. The point of discharge is upon a mountainous ridge dividing Eagle Valley from Washoe Valley. Water discharged at this point, following the natural depressions of the mountain, would find its way to Washoe Valley. The water may also be directed to Eagle Valley by means of a ditch leading from the flume to the cañon, and, when so directed, falls into the channel. Through the agency of the water company, the discharged water has been sent, some years to one of these valleys, other years to the other valley, and again to both valleys. During the month of July, 1885, and before the commencement of this action, the water company, for a valuable consideration, leased to the defendant the water that should be discharged at the mouth of the flume during the remainder of the year. The district court decided that defendant acquired no rights by reason of the lease, and a decree based upon this conclusion was accordingly entered. In support of the decree, it is said that if the right to dispose of the flume waters rested anywhere, it was in the flume company, and not in the water company; but that, in any event, nothing passed by the lease, because the waters were abandoned.

In the view we take of this case, we deem it immaterial to inquire where the right of disposition rested. The water was discharged from the flume for the purpose of getting rid of it, and left to find its way to the natural level of the country, through the lands of others, without intention to reclaim or enjoy it. Neither company undertook to exercise any control

over the water after it was discharged, save to direct it to one valley or the other, and so as to do no injury to settlers along its course. These facts are conclusive evidence of an abandonment. The effect of turning the waters into the channel was to make them a part of the stream, and subject to the same rights as the water naturally flowing therein. This principle will be shown by reference to authorities. In Goddard's Law of Easements, page 51, it is thus stated: "When a stream is natural, there can be no doubt that all waters which flow into it become a part of that stream, and subject to the same natural rights as the rest of the water, and that it makes no difference that the water so flowing to the natural stream was sent down by artificial means."

In *Wood* v. *Waud*, 3 Ex. 779, the effect of mingling the waters of an artificial drain with those of a natural stream was considered. The court said: "Have the plaintiffs a right to the waters of this slough, as described in the third count of the declaration? It appears to us to be clear that as they have a right to the use of the Bowling Beck, as incident to their property on the banks and bed of it, they have the right to all the water which actually formed part of that stream as soon as it had become part, whether such water came by natural means, as from springs, or from the surface of the hills above, or from rains or melted snow, or was added by artificial means, as from drainage of lands or of colliery works; and if the proprietors of the drained lands, or of the colliery, augmented the stream by pouring water into it, and so gave it to the stream, it would become a part of the current. No distinction could then be made between the original natural stream and such accessions to it": See also Washburn on Easements, 274; Angell on Watercourses, sec. 95; *Eddy* v. *Simpson*, 3 Cal. 249; 58 Am. Dec. 408.

In behalf of appellant, it is claimed that the use of the channel for the purpose of conducting the water to the defendant's dam was not an abandonment of the water. *Hoffman* v. *Stone*, 7 Cal. 47, and *Butte Canal Co.* v. *Vaughn*, 11 Id. 143, 70 Am. Dec. 769, decide that it is not an abandonment of artificial waters to mingle them with the water of a natural watercourse for the purpose of conducting them to the point where they are to be used. In such cases, the prior appropriator cannot complain of the use made of the bed of the stream, so long as the party conducting the water does not divert more than he has added to the stream. But these cases are plainly distingu'sh-

able from the one at bar. In them, the water was turned into the stream for the purpose of diverting a like quantity at a point farther down; this was the end to be accomplished; while here the water was discharged into the stream as a matter of convenience, and without intention of recapturing it.

Exceptions were taken to the failure of the court to ascertain, by its findings of fact, the extent of defendant's appropriation of the water. The decree provides that the water of the channel shall pass over the lands of the plaintiff before any right to its use by defendant shall attach. In this respect it is technically erroneous. Defendant, as an appropriator of the water, should have the right to divert it to the extent of his appropriation, either above or below the lands of the plaintiff. The decree should have ascertained the amount of water to which he was entitled, and recognized this right. But the point at which the water might be diverted does not appear to have been a question at the trial. It was not shown that defendant could not divert the water as advantageously below the land of the plaintiff as above it. No pretense is made that by reason of this provision of the decree defendant is in any wise prejudiced in the use of the water. The diversion above the land of plaintiff, by means of the dam and ditch, was not because that was a more beneficial way of using the water, but was for the purpose of preventing the use of the flume water by the plaintiff.

The error works no injury to the defendant, and does not authorize a reversal.

Judgment and decree affirmed.

RIGHT TO AFTERWARDS USE WATER TURNED INTO NATURAL STREAM: See *Eddy* v. *Simpson*, 58 Am. Dec. 408; *Butte Canal etc. Co.* v. *Vaughn*, 70 Id. 769; *Dougherty* v. *Creary*, 87 Id. 116; *Davis* v. *Gale*, 91 Id. 554.

ABANDONMENT OF WATER, WHAT CONSTITUTES: See note to *Heath* v. *Williams*, 43 Am. Dec. 282; *Eddy* v. *Simpson*, 58 Id. 408; *Butte Canal etc. Co.* v. *Vaughn*, 70 Id. 769; *Dougherty* v. *Creary*, 89 Id. 116; *Davis* v. *Gale*, 91 Id. 554.

ABANDONMENT IS QUESTION OF INTENTION: *Moon* v. *Rollins*, 95 Am. Dec. 181, and note collecting cases.

YOUNG v. BREHE.

[19 NEVADA, 379.]

JUDGMENT AGAINST DEFENDANT IN ACTION ON PROMISSORY NOTES IS CONCLUSIVE AGAINST HIM IN SUBSEQUENT ACTION by the plaintiff therein on other promissory notes, where the defense in both actions was that the defendant had executed and delivered to the plaintiff a deed, which was accepted by the plaintiff in full payment of all the notes, and where the verdict in the first action established the fact that the deed was never delivered and accepted as alleged.

MATTER OF ESTOPPEL IS AS CONCLUSIVE WHEN ADMITTED IN EVIDENCE AS IF PLEADED, when there has been no opportunity to plead it.

OPERATION OF JUDGMENT AS ESTOPPEL IS NOT AFFECTED by the fact that a motion for a new trial is pending in the action in which it is given.

ACTION on promissory notes. The facts are stated in the opinion.

Henry K. Mitchell, for the appellant.

Baker and Wines, for the respondent.

By Court, LEONARD, J. In May, 1884, defendant owed plaintiff nearly six thousand dollars, upon promissory notes secured by mortgages, and for money paid out. On the second day of October, 1884, plaintiff brought an action in the district court of Eureka County to recover $2,647, and interest, upon two promissory notes, and for money paid out. That case was transferred to White Pine County for trial. In his answer, defendant denied any and all indebtedness, and alleged that he had paid plaintiff in full all sums of money claimed in the complaint to be due. After trial upon the merits, plaintiff recovered a verdict and judgment for $2,372.

At the trial in this case, it was admitted and agreed that, in the White Pine case, defendant had filed and served notice of intention to move for a new trial; that no statement had been settled; that said motion was still pending; and that defendant had not executed any bond or undertaking on appeal. Plaintiff instituted this action in the district court of Eureka County, October 9, 1884, to recover two thousand six hundred dollars, and interest alleged to be due upon two other promissory notes. In his answer, as in the White Pine case, defendant denied any and all indebtedness, and pleaded full payment of each note described in the complaint. The record shows, without contradiction, that in the White Pine case, to sustain his allegation of payment, defendant insisted and introduced much evidence tending to prove that, on or

about May 31, 1884, in pursuance of an agreement entered into between plaintiff and defendant, he sold and delivered to plaintiff certain personal property, and conveyed, by good and sufficient deed, real estate in full payment and satisfaction of all indebtedness then existing against him in favor of plaintiff, which included that claimed in the action then being tried, and also the amount in question in this action; and that said sale and conveyance were accepted by plaintiff in full payment and satisfaction of the entire indebtedness mentioned; that, on the contrary, plaintiff claimed and insisted and introduced evidence tending to prove that the attempted settlement was never consummated; that the deed was never delivered to or accepted by him, and therefore that the notes then in question had not been paid.

The verdict in that case must have turned on those issues, for there were no others, and it was in favor of plaintiff. Yet in this action, between the same parties, those are the precise questions which defendant endeavored to agitate again; and to that end he introduced evidence substantially the same as that produced at the trial in White Pine.

After defendant had rested, for the purpose of proving what questions were submitted and determined in the former case, plaintiff introduced in evidence copy of complaint, summons, answer, order of removal to White Pine County for trial, verdict, and judgment in that case, and also oral testimony showing what evidence was introduced by the respective parties in support of the issues there made. The court charged the jury, among other things, that if they found the verdict of the jury and the judgment of the court in the case tried in White Pine were in favor of plaintiff upon the issues of delivery or non-delivery, acceptance or non-acceptance, of the said deed, and if they further found that defendant in this action relied upon the execution and alleged delivery to plaintiff of the same deed, and claimed that the said deed was executed and delivered at the same time testified to by him upon the trial in White Pine County, then said verdict and judgment so rendered and entered in favor of plaintiff, and against defendant, upon the trial of said action in White Pine County were conclusive upon defendant in this action, and their verdict must be for plaintiff; unless they found from the evidence that there was some payment made by defendant of the notes sued on in this action, other than the execution and delivery of said deed. The jury found for defendant, and judgment was entered in his

favor for his costs. Plaintiff moved for a new trial on the ground that the evidence was insufficient to justify the verdict, and did not support the verdict. The court ordered a new trial upon the ground stated in the motion, and defendant appeals from that order.

The district court in White Pine County had jurisdiction of the parties and the subject-matter of that action. The court and the district court of Eureka County had concurrent jurisdiction. In the two cases mentioned, the parties and the issues made by the pleadings were the same. The facts put in issue and found by the jury in the White Pine case in favor of plaintiff, upon which recovery was based, were identical with those that defendant attempted to establish in his favor in this action, and upon which he relied to defeat plaintiff's recovery. The verdict and judgment in the former case established the fact conclusively that the deed referred to was not delivered or accepted in payment or satisfaction of plaintiff's demands, and consequently that the notes and claims in question in that action had not been paid thereby. If there was not such delivery or acceptance of the deed as to constitute payment of the demands in question in that action, the same was true of the notes involved in this, because the transaction was entire, and the conveyance covered and satisfied the whole indebtedness, if any part of it. Upon these facts, the judgment in the former case, as evidence, was conclusive against defendant upon the only material issues raised in this case: *McLeod* v. *Lee*, 17 Nev. 103; 1 Greenl. Ev., sec. 534; *Caperton* v. *Schmidt*, 26 Cal. 496; 85 Am. Dec. 187; *Gardner* v. *Buckbee*, 3 Cow. 125; 15 Am. Dec. 256; *Burt* v. *Sternburgh*, 4 Cow. 562; 15 Am. Dec. 402; *Burke* v. *Miller*, 4 Gray, 115; *Doty* v. *Brown*, 4 N. Y. 72; 53 Am. Dec. 350; *White* v. *Coatsworth*, 6 N. Y. 139.

The estoppel was not pleaded in bar, but, when there has been no opportunity to do so, the matter of estoppel, when admitted in evidence, is just as conclusive as it would have been if it had been pleaded: 1 Greenl. Ev., 13th ed., sec. 531; *Perkins* v. *Walker*, 19 Vt. 148. In this case plaintiff had no opportunity to plead it: *Clink* v. *Thurston*, 47 Cal. 38. In fact, the only reason suggested by counsel for appellant why the judgment in the former case was not conclusive against defendant in this action, upon all material issues, that is to say, upon the questions of delivery and acceptance of the deed, and consequently as to payment of the notes in suit, is, that the judgment admitted in evidence was not final, and there-

fore not a bar; because in that case a notice of intention to move for a new trial had been filed, and was still pending, although no appeal had been taken, and no bond or undertaking on appeal or to stay execution had been executed. We are referred to no authorities that sustain counsel's position, and know of none. Although the question as to the effect of an appeal from a judgment of a district court to the supreme court, with or without a stay-bond, is not in this case, yet this court, on two occasions, has decided that the validity of such judgment is not suspended or affected by a bare appeal: *Rogers* v. *Hatch*, 8 Nev. 39; *Cain* v. *Williams*, 16 Id. 430. See also *Nill* v. *Comparet*, 16 Ind. 108; 79 Am. Dec. 411; *Burton* v. *Burton*, 28 Ind. 343; *Burton* v. *Reeds*, 20 Id. 87. The pendency of motion for a new trial did not even stay execution: *People* v. *Loucks*, 28 Cal. 70; *Jones* v. *Spears*, 56 Id. 164; Hayne on New Trial, sec. 3. The judgment disposed of every issue in the case, and was final: *Perkins* v. *Sierra Nev. S. M. Co.*, 10 Nev. 405; *Lake* v. *King*, 16 Id. 216.

Defendant did not claim that he had paid the notes in question, unless the execution and alleged delivery of the deed of May 31, 1884, constituted such payment. Upon that point the former judgment was conclusive against him, and the court did not err in granting a new trial.

Order appealed from affirmed.

JUDGMENT, AS TO WHAT FACTS CONCLUSIVE: See *Lea* v. *Lea*, 96 Am. Dec. 772, and elaborate note; *Burlen* v. *Shannon*, 96 Id. 733. As to the effect of an appeal or writ of error upon the judgment, see *Nill* v. *Comparet*, 79 Id. 411, and cases in note thereto.

ESTOPPEL OF MATTER OF RECORD, WHETHER MUST BE PLEADED: See *Emery* v. *Fowler*, 62 Am. Dec. 627, and note; *Gray* v. *Gillilan*, 60 Id. 761; *Blood* v. *Marcuse*, 99 Id. 435.

STATE EX REL. STEVENSON *v.* TUFLY.

[19 NEVADA, 391.]

AMENDMENT TO CONSTITUTION CAN BE MADE ONLY IN MODE PROVIDED by the instrument itself, which must be strictly followed; and, therefore, where an amendment, proposed in the legislature, was not entered upon the journal of either house, as required by the constitution of Nevada, such omission is fatal to its adoption, notwithstanding a majority of the electors of the state, afterwards, at a general election, ratified the amendment.

MANDAMUS to compel George Tufly, state treasurer, to comply with the provisions of an amendment to the constitution of the state of Nevada. The opinion states the facts.

J. F. Alexander, attorney-general, for the relators.

William M. Stewart, for the respondent.

By Court, BELKNAP, J. This is an amicable proceeding brought for the purpose of testing the validity of an amendment to the constitution authorizing the investment of moneys pledged to educational purposes in the bonds of any of the states of the United States.

Section 1 of article 16 of the constitution prescribes how amendments may be made without calling a convention. It reads as follows: "Any amendment or amendments to this constitution may be proposed in the senate or assembly; and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their respective journals, with the yeas and nays taken thereon, and referred to the legislature then next to be chosen, and shall be published for three months next preceding the time of making such choice. And if, in the legislature next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment or amendments to the people in such manner and at such time as the legislature may prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the legislature voting thereon, such amendment or amendments shall become a part of the constitution."

At the eleventh session of the legislature, the following proposed amendment was agreed to:—

"Resolved by the senate, the assembly concurring, that section 3 of article 11 of the constitution of the state of Nevada be amended so as to read as follows:—

"SEC. 3. All lands, including the sixteenth and thirty-sixth sections in every township, donated for the benefit of the public schools in the act of the thirty-eighth Congress to enable the people of the territory of Nevada to form a state government, the thirty thousand acres of public lands granted by an act of Congress, approved July 2, A. D. 1862, for each senator and representative in Congress, and all proceeds of lands that have been or may hereafter be granted or appropriated by the United States to this state, and also the five hundred thousand acres of land granted to the new states

under the act of Congress distributing the proceeds of the public lands among the several states of the Union, approved A. D. 1849, provided that Congress make provisions for or authorize such diversion to be made for the purpose herein contained; all estates that may escheat to the state; all of such per cent as may be granted by Congress on the sale of lands; all fines collected under the penal laws of this state; all property given or bequeathed to the state for educational purposes; and all proceeds derived from any or all said sources,—shall be, and the same are hereby, solemnly pledged for educational purposes, and shall not be transferred to any other fund for other uses, and the interest thereon shall, from time to time, be apportioned among the several counties in proportion to the ascertained number of the persons between the ages of six and eighteen years in the different counties, and the legislature shall provide for the sale of floating land warrants to cover the aforesaid lands, and for the investment of all proceeds derived from any of the above-mentioned sources in United States bonds or bonds of this state, or the bonds of such other state or states as may be selected by the boards authorized by law to make such investments; provided, that the interest only of the aforesaid proceeds shall be used for educational purposes, and any surplus interest shall be added to the principal sum; and provided further, that such portions of said interest as may be necessary may be appropriated for the support of the state university."

No entry of the proposed amendment was made upon the journal of either house, and the question presented is, whether or not this omission was fatal to the adoption of the amendment.

An inquiry based upon similar facts and constitutional provisions was recently presented to the supreme court of Iowa. In pronouncing the amendment invalid, the court employed the following language, which we adopt: "The object of the provision [entering the amendment upon the journals] cannot be doubted or misunderstood. It is to preserve, in the manner indicated, the identical amendment proposed, and in an authentic form which, under the constitution, is to come before the succeeding general assembly. No better mode could have been adopted when it is considered that, to be effective, the proposed amendment must be agreed to by the succeeding general assembly. This thought is much strengthened by the consideration that the proposed amendment is only required

to be entered on the journals of the first general assembly which acts thereon. This distinction, to our minds, is significant, and enhances the importance of the constitutional injunction that the proposed amendment shall be entered on the journals of both houses of the general assembly which first agrees thereto": *Koehler* v. *Hill*, 60 Iowa, 543.

The court considered the omission fatal, nothwithstanding a vote of the people had approved the proposed amendment, and declared that if any provision of the constitution should be regarded as mandatory, it is when it provides for its own amendment.

The remarks of Judge Cooley made in considering the construction to be placed upon constitutional provisions are pertinent and instructive. He says: "In all we have said upon this subject, we have assumed the constitutional provision to be mandatory. . . . . The fact is this: That whatever constitutional provision can be looked upon as directory merely is very likely to be treated by the legislature as if it were devoid even of moral obligation, and to be therefore habitually disregarded. To say that a provision is directory seems, with many persons, to be equivalent to saying that it is not law at all. That this ought not to be so must be conceded; that it is so we have abundant reason and good authority for saying. If, therefore, a constitutional provision is to be enforced at all, it must be treated as mandatory. And if the legislature habitually disregarded it, it seems to us that there is all the more urgent necessity that the courts should enforce it. And it also seems to us that there are few evils which can be inflicted by a strict adherence to the law so great as that which is done by the habitual disregard, by any department of the government, of a plain requirement of that instrument from which it derives its authority, and which ought, therefore, to be scrupulously observed and obeyed": Cooley's Const. Lim. 183.

In *Collier* v. *Frierson*, 24 Ala. 108, it appeared that the legislature had proposed eight different amendments to be submitted to the people at the same time. The people had approved them, and all the requisite proceedings to make them a part of the constitution had been had, except that, in the subsequent legislature, the resolution for their ratification had, by mistake, omitted to recite one of them. On the question whether this one had been adopted, we quote from the opinion of the court: "The constitution can be amended in but two ways,—either by the people who originally framed it, or in the

mode prescribed by the instrument itself. If the last mode is pursued, the amendments must be proposed by two thirds of each house of the general assembly; they must be published in print at least three months before the next general election for representatives; it must appear from the returns made to the secretary of state that a majority of those voting for representatives have voted in favor of the proposed amendments; and they must be ratified by two thirds of each house of the next assembly after such election, voting by yeas and nays; the proposed amendments having been read at each session three times on three several days in each house. We entertain no doubt that, to change the constitution by any other mode than by a convention, every requisition which is demanded by the instrument itself must be observed, and the omission of any one is fatal to the amendment. We scarcely deem any argument necessary to enforce this proposition. The constitution is the supreme and paramount law. The mode by which amendments are to be made under it is clearly defined. It has been said that certain acts are to be done, certain requisitions are to be observed, before a change can be effected. But to what purpose are those acts required, or those requisitions enjoined, if the legislature, or any department of the government, can dispense with them? To do so would be to violate the instrument which they are sworn to support; and every principle of public law and sound constitutional policy requires the courts to pronounce against any amendment which is not shown to have been made in accordance with the rules prescribed by the fundamental law": Cooley's Const. Lim. 40.

At the last general election a majority of the electors of the state ratified the amendment, and we are asked at the argument to give this fact such consideration as it may deserve. The suggestion is doubtless based upon the fact that, under our form of government, all political power originates with the people. The bill of rights contained in our constitution declares that " all political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people; and they have the right to alter or reform the same whenever the public good may require it."

In commenting upon reservations of this character, Judge Cooley says: "Although by their constitutions the people have delegated the exercise of sovereign powers to the several departments, they have not thereby divested themselves of the sovereignty. They retain in their own hands, so far as they

have thought it needful to do so, a power to control the governments they create, and the three departments are responsible to and subject to be ordered, directed, changed, or abolished by them. But this control and direction must be exercised in the legitimate mode previously agreed upon. The voice of the people, in their sovereign capacity, can only be of legal force when expressed at the times and under the conditions which they themselves have prescribed and pointed out by the constitution, or which, consistently with the constitution, have been prescribed and pointed out for them by statute; and if by any portion of the people, however large, an attempt should be made to interfere with the regular working of the agencies of government at any other time or in any other mode than as allowed by existing law, either constitutional or statutory, it would be revolutionary in character, and must be resisted and repressed by the officers who, for the time being, represent legitimate government": Cooley's Const. Lim. 751.

We conclude that amendments to the constitution can be made only in the mode provided by the instrument itself. A proposed amendment, if agreed to by a majority of each house of the legislature, must be entered upon the journals, so that no doubt may arise as to its provisions. The yeas and nays must be entered, in order to ascertain whether the requisite number have agreed to the amendment. It is then to be referred to the next legislature, and is to be published for three months preceding the election, so that the members may, if the people desire, be elected specially to consider it. And finally, the proposed amendment must be submitted by the legislature to a vote of the people. These provisions were intended to secure care and deliberation on the part of the legislature and people, and are exclusive and controlling.

The amendment was not constitutionally adopted. The statute enacted for the purpose of executing its provisions is unconstitutional, and respondent properly refused to comply with its requirements.

Mandamus denied.

ENTERING CONSTITUTIONAL AMENDMENTS IN JOURNALS OF LEGISLATURE: See this question discussed in *Oakland Paving Co.* v. *Tompkins*, 1 Am. St. Rep. 17, and the note thereto.

EX PARTE ROSENBLATT.

[19 NEVADA, 439.]

STATE STATUTE IS REGULATION OF INTERSTATE COMMERCE, AND IS UNCONSTITUTIONAL AND VOID as to a citizen of another state soliciting orders for goods to be delivered from that state, where it provides for the licensing of traveling merchants and salesmen, and makes it a misdemeanor for them to carry on their business without first obtaining a license.

CONSTITUTIONALITY OF ACT UNDER WHICH PARTY HAS BEEN CONVICTED may be inquired into on *habeas corpus*.

HABEAS CORPUS. The facts are stated in the opinion.

R. H. Lindsay and S. D. King, for the petitioner.

J. F. Alexander, attorney-general, and T. Coffin, for the state.

By Court, BELKNAP, J. The petitioner was convicted of a violation of an act of the legislature of the state, approved February 23, 1885, entitled "An act providing for the licensing of traveling merchants, and merchants doing business through soliciting agents, commonly known as 'drummers'" (Gen. Stats. 1269), in acting as soliciting agent or drummer without procuring a license therefor. He is held in custody under a commitment issued upon the judgment.

In his petition for a writ of *habeas corpus*, he alleges that he is a resident of the state of California, and that he was at the time of his arrest a traveling merchant, soliciting agent, and drummer, offering goods, wares, and merchandise for sale in the town of Reno, to be delivered at a future time from the state of California by his principals, residents of that state; that by the act of the legislature before mentioned, it is made a misdemeanor to exercise any such occupation without having first obtained a license therefor; and that, under this law, he was convicted, first, in the court of the justice of the peace, and afterwards, upon appeal in the district court of Washoe County. He avers that the enactment of the legislature imposing the license tax is unconstitutional and void, because repugnant to that clause of the constitution of the United States which declares that Congress shall have power to regulate commerce among the several states; and prays to be released from his imprisonment.

The supreme court of the United States, in a recent case, — that of *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, — considered the constitutionality of a statute of the state of Tennessee involving the same question. The Tennessee

statute declared that "all drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares, or merchandise therein by sample, shall be required to pay to the county trustee the sum of ten dollars per week, or twenty-five dollars per month, for such privilege; and no license shall be issued for a longer term than three months." Robbins, a citizen of the state of Ohio, employed by citizens of that state having a business house at Cincinnati, was convicted of a violation of the law. On appeal to the supreme court of the state, the judgment was affirmed. The case was then carried to the supreme court of the United States upon a writ of error. It was held that the business of selling goods, which were in Ohio at the time of sale, and were at a future time to be delivered to the purchaser in the state of Tennessee, constituted interstate commerce, and that the license tax imposed by the statute was a tax upon interstate commerce, and invalid.

The statute of Tennessee and that of this state do not materially differ. Neither imposes a tax upon citizens of other states that does not equally apply to its own citizens, nor is there any discrimination in either statute against other states or their products. The principles of the decision of the supreme court in the Robbins case must be accepted as establishing the unconstitutionality of the statute under which the petitioner was convicted.

It is urged, however, that the district court had jurisdiction to determine the constitutionality of the statute, and that its judgment cannot be reviewed upon a writ of *habeas corpus*. But the district court did not have jurisdiction, because the state could not lawfully impose the license tax. There was, in legal contemplation, no law creating the offense of which the petitioner was convicted.

"An unconstitutional law," said the supreme court of the United States, in *Ex parte Siebold*, 100 U. S. 377, "is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's

authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having authority to award the writ." See also *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Yarbrough*, 110 Id. 654.

It is ordered that the petitioner be discharged.

STATE STATUTES IMPOSING LICENSE TAX ON PEDDLERS AND DRUMMERS HAVE BEEN HELD NOT TO BE UNCONSTITUTIONAL, as regulations of interstate commerce, by a number of state courts: *Ward* v. *State*, 1 Am. Rep. 50; *Speer* v. *Commonwealth*, 14 Id. 164; *Morrill* v. *State*, 20 Id. 12; *Ex parte Robinson*, 23 Id. 794; *State* v. *Long*, 59 Id. 263. See the contrary opinion in *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, followed in the principal case, quoted at length in a note to *State* v. *Long*, 59 Am. Rep. 267; see also *City of Marshalltown* v. *Blum*, 43 Id. 116; *Grafty* v. *City of Rushville*, 57 Id. 128.

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2. POSSESSION BY MORTGAGOR OR HIS GRANTEES IS NOT ADVERSE so long as payments of principal or interest are made, or the relation of mortgagor and mortgagee is recognized by both parties. *Id.*

AGENCY.

1. AGENT WHO EXCEEDS HIS AUTHORITY, SO THAT HIS PRINCIPAL IS NOT BOUND, will himself be liable for the damage thus occasioned to the other contracting party, although he may have been innocent of any intention to deceive. *Dale* v. *Donaldson Lumber Co.*, 224.
2. ONE WHO BUYS BY AGENT BUYS BY HIMSELF, and the law imputes to him knowledge that he must pay, and the corresponding intent to pay, for what he owes. *Davison* v. *Holden*, 40.
3. POWER OF ATTORNEY AUTHORIZING AGENT TO SELL principal's lands at a price not less than a specified sum imposes upon the agent the duty of selling and accounting for the highest price obtainable, although the power was executed upon a valuable consideration paid by the agent, and this latter fact does not authorize the agent to reserve or acquire for himself any interest in the purchase. *Miller* v. *Louisville & N. R. R. Co.*, 722.
4. PURCHASER FROM AGENT, WHO ALLOWS the latter to acquire an interest in the purchase in violation of his contract with his principal, is not a *bona fide* purchaser, so as to entitle him to protection against the right of the principal to set the sale aside. *Id.*
5. ON BILL BY PRINCIPAL TO SET ASIDE CONTRACT OF SALE made by his agent, on the ground of fraud and collusion between the agent and purchaser, an averment that plaintiff "immediately after learning that said pretended sale had been made repudiated it, tendered back the money and notes, and notified defendants that he would not comply with such contract," sufficiently sustains the equity of the bill on demurrer; but

before relief will be granted under the bill, the money and notes must be brought into court. *Id.*

6. PERSONS ENGAGED IN BUSINESS OF MAKING ABSTRACTS OF TITLE occupy a relation of confidence towards those employing them, which is second only in the sacredness of its nature to the relation which a lawyer sustains to his client. They should be held to a strict responsibility in the exercise of the trust and confidence which are necessarily reposed in them, and any abuse of such trust and confidence should be met with emphatic rebuke. *Vallette* v. *Tedens*, 502.

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2. ORDER MADE BY COURT AGAINST GARNISHEE AFTER JUDGMENT cannot be collaterally attacked; but if proper proceedings are had before the pay-

ment of the money to the creditor to show that it was absolutely exempt, the court should withhold the money and refuse to apply it in satisfaction of the debt. *Union Pac. R'y Co.* v. *Smeresk*, 290.

3. ALTHOUGH STATUTE DOES NOT REQUIRE NOTICE TO BE GIVEN TO JUDGMENT DEBTOR in cases of garnishment after judgment, yet such notice should be required in every case, and the courts have undoubted authority to require it to be given before the garnishee files his answer. *Id.*

4. SERVICE OF PROCESS OF GARNISHMENT DOES NOT CREATE SPECIFIC LIEN in favor of the plaintiff upon the property of the defendant in the hands of the garnishee. *McGarry* v. *Lewis Coal Co.*, 522.

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2. FINDING OF REFEREE AND COURT, as to what would be reasonable compensation for services rendered as attorney, will not be disturbed when founded on the decided weight of expert testimony. *Fillmore* v. *Wells*, 567.

3. ATTORNEY'S LIEN IS NOT LIMITED TO COSTS or to taxable fees, in Colorado, but it reaches all fees due for services rendered, whether the amount has been agreed upon or is to be settled in suit as upon a *quantum meruit*. *Id.*

4. ATTORNEY'S LIEN, IN COLORADO, IS NOT LIMITED TO COMPENSATION for services rendered by the attorney in procuring the judgment upon which he relies. *Id.*

5. ATTORNEY'S LIEN, IN COLORADO, ATTACHES as well to judgments involving an interest in real property as to mere money judgments. *Id.*

6. WHERE ATTORNEY NEGLECTS TO PROCEED TO ENFORCE HIS LIEN for compensation under a judgment involving an interest in land until the judgment debtor has discharged his liability, or an innocent third party has, in good faith and for valuable consideration, purchased the land, the attorney will be held to have waived and lost his right to look to the debtor on one hand and the land on the other for his compensation. *Id.*

7. ATTORNEY'S LIEN FOR COMPENSATION will support a suit in equity, where the employment is questioned and the amount unliquidated, and having assumed jurisdiction to enforce the lien, equity will retain it for all purposes, determining the incidental though material legal questions involved. *Id.*

8. ATTORNEY'S LIEN IS EQUITABLE RIGHT or privilege. It is not property in the thing which gives right of action at law, but a charge upon the thing which is protected in equity, though law courts may recognize it when the *res* is in possession of the leinor and the owner is seeking to deprive him of it. *Id.*

9. WHERE ATTORNEY'S LIEN ATTACHES UNDER JUDGMENT involving an interest in land, and the latter afterwards becomes a trust estate for several wards, an equitable action will lie to directly enforce the lien against and upon a specific part of the ward's estate, without first obtaining judgment against the several guardians. *Id.*

10. IN EQUITABLE ACTION TO ENFORCE ATTORNEY'S LIEN under a judgment concerning an interest in land which afterwards becomes a trust estate belonging to wards, testimony as to facts which occurred subsequent to the ancestor's decease is admissible. *Id.*

11. ATTORNEY'S LIEN NOT AFFECTED BY FRAUDULENT SETTLEMENT OUT OF COURT. — In an action for divorce and alimony, the court made an order in the progress of the case, requiring the payment into court of a sum of money for attorneys' fees. Afterwards the parties to the action, collusively and fraudulently, and for the purpose of defrauding the attorney for the plaintiff out of the allowance made by the court for him, and with notice of an attorney's lien thereon in his favor, "settled and dismissed" the case. The attorney filed a motion to set aside the fraudulent settlement, and the court sustained the motion. No notice of the pendency of the motion was served upon the original plaintiff. *Held*, 1. That the motion was properly sustained, and the amount found due was properly ordered to be paid into court by the defendant; 2. That notice upon the original plaintiff of the pendency of the motion was unnecessary, as no relief was sought as against her, and it was not sought to affect her rights in any way. *Aspinwall* v. *Sabin*, 258.

BAILMENTS.

See TROVER.

BANKS AND BANKING.

1. ONE WHO PAYS FORGED CHECK DOES SO AT HIS PERIL, and if by means of his indorsement and use of the same he thereby obtains money from another, he is liable for the amount thus obtained. *First Nat. Bank* v. *State Bank*, 294.

2. BANKS AND BANKING — LIABILITY FOR PAYMENT ON FORGED CHECK. — A check was presented to the bank of O., purporting to be drawn by one C. on the bank of A. for $385. The cashier of the bank of O. was unacquainted with the person who presented the check, and required no proof as to his identity, but paid the check, after comparing the signature of the purported drawer with his genuine signature in the signature-book of said bank. The check was then sent to a bank in Lincoln, and was there credited to the bank of O., and forwarded by the Lincoln bank to the bank at A., on which it was drawn, and it was paid by said bank. It was afterwards discovered that the check was a forgery, and the bank at Lincoln, and also the bank of O., were notified thereof. *Held*, that the latter was liable for the amount received by it on the check. *Id.*

BONA FIDE PURCHASERS.

WHERE OWNER OF PROPERTY CLOTHES ANOTHER WITH APPARENT TITLE or power of disposition, and thus induces innocent purchasers to buy, they will be protected, not upon the title or authority of the party from whom they buy, but from the act of the owner, who is estopped from disputing as against them the title or power which he allowed to appear to be vested in the party making the sale. *Velsian* v. *Lewis*, 184.

See AGENCY.

BONDS.

See OFFICE AND OFFICERS; SURETYSHIP.

BOUNDARIES.

SETTLED RULE IN DESCRIPTION OF BOUNDARIES TO LAND IS, that monuments, whether natural objects or artificial marks, are allowed to dominate courses and distances given in deeds. *Crampton* v. *Prince*, 718.

See DEEDS, 1.

CHARITABLE USES.

1. GRANT FOR PUBLIC CHARITABLE USE UNCONDITIONAL as to the time when the land granted must be used, and without limit as to the time when the use must begin, cannot be forfeited for non-user, nor will the court supply conditions by implication when they were not annexed at the time the grant was made. Strahan, J., on rehearing. *Raley* v. *Umatilla Co.*, 142.

2. GIFTS AND TRUSTS FOR PUBLIC CHARITABLE USES are favorably and liberally construed, and in such cases it is not necessary that the trustee be known or capable of taking, nor that the beneficiary or objects of the charity be certain and definite. Strahan, J., on rehearing. *Id.*

See COUNTIES.

CHECKS.

See BANKS AND BANKING.

COMMON CARRIERS.

1. COMMON CARRIER IS NOT LIABLE FOR FAILURE TO TRANSPORT GOODS or furnish cars therefor, unless the goods are offered at a regular depot, or other usual or designated place for receiving freight. *Louisville etc. R'y Co.* v. *Flanagan*, 674.

2. TO MAINTAIN ACTION AGAINST RAILROAD COMPANY FOR REFUSAL TO TRANSPORT FREIGHT, the refusal of the company, upon demand, to furnish cars for transporting articles placed at a station on its line, relieves the owner from making any further delivery or offer to deliver to the company. *Id.*

3. PERSON CONTRACTING WITH RAILROAD COMPANY FOR TRANSPORTATION of goods, and making delivery of them to the company, may rely upon the fulfillment of the contract until it is repudiated and he is notified by the company to that effect, within a reasonable time; and for injury to the goods by delay, either in transportation or notification, he may recover damages. *Id.*

4. CONTRACT OF RAILROAD COMPANY BEFORE COMPLETION OF ITS LINE, for carriage of freight, cannot be claimed by the company to be *ultra vires*, where it has been so far executed that the company has received the benefits thereof, which benefits it continues to retain. *Id.*

See TROVER, 1, 2; WATERS, 16.

CONDITIONS.

1. DEED OF LAND TO COUNTY BY WHICH GRANTORS COVENANT to "warrant and defend the same against all claims whatsoever, to the use and benefit of the grantee, for the special use, and none other, of educational purposes, and upon which shall be erected a college or institution of learning free from all sectional or political influence," does not create a condition subsequent. *Raley* v. *Umatilla Co.*, 142.

2. ESTATE UPON CONDITION IS ONE which is made to vest or to be enlarged or defeated upon the happening or not happening of some event. The condition may be express or implied, precedent or subsequent. *Id.*

3. EXPRESS CONDITION is one declared in terms in the deed creating the estate. *Id.*

4. IMPLIED CONDITION is one which the law implies, either from its being always understood to be annexed to certain estates, or as annexed to estates held under certain circumstances. *Id.*

5. CONDITIONS PRECEDENT are such as must happen before the estate dependent upon them can arise or be enlarged. *Id.*
6. CONDITIONS SUBSEQUENT are such as, when they do happen, defeat the estate. *Id.*
7. TO CREATE CONDITION IN GRANT, appropriate words should be used; as, "on condition," "provided always," "if it shall so happen," or "so that the grantee pay, etc., within a specified," and the like. *Id.*
8. ESTATE UPON CONDITION CANNOT BE CREATED by deed except when the terms of the grant will admit of no other reasonable construction. Therefore a recital in a deed that it is in consideration of a certain sum, and that the grantee is to do certain things, is not an estate upon condition unless it contains a clause of re-entry or forfeiture. But the same words may create a condition if a right of re-entry is reserved in favor of the grantor, in case of failure to carry out the intention expressed. *Id.*
9. CONDITIONS SUBSEQUENT, NUMEROUS EXAMPLES GIVEN OF PHRASES USED IN DEEDS and held not to create. *Id.*
10. IMPOSSIBLE OR ILLEGAL CONDITION is void, and the grantee takes the estate freed from the condition. *Id.*
11. ON BREACH OF CONDITION SUBSEQUENT IN DEED, the party entitled may re-enter, or, if necessary, maintain an action to regain his estate, but equity will not entertain jurisdiction for that purpose. *Id.*

CONSTITUTIONAL LAW.

1. AMENDMENT TO CONSTITUTION CAN BE MADE ONLY IN MODE PROVIDED by the instrument itself, which must be strictly followed; and, therefore, where an amendment, proposed in the legislature, was not entered upon the journal of either house, as required by the constitution of Nevada, such omission is fatal to its adoption, notwithstanding a majority of the electors of the state, afterwards, at a general election, ratified the amendment. *State ex rel. Stevenson* v. *Tufly*, 895.
2. PROVISION OF FEDERAL CONSTITUTION, ARTICLE 1, SECTION 10, that no state shall pass any law impairing the obligation of contracts, has no application to rules of evidence prescribed by the law-making power of the state to govern proceedings in the courts of the state. Hence the Virginia act of January 26, 1886, which requires that in any suit involving the genuineness of coupons purporting to have been cut from state bonds, the bond shall be produced, with proof that the coupon was actually cut therefrom, is not repugnant to said provision. Nor is the Virginia act of January 21, 1886, repugnant thereto, which provides that expert evidence shall not be received to prove the genuineness of any paper or instrument made by machinery, etc. *Cornwall* v. *Commonwealth*, 121.
3. NO ONE CAN SUE STATE EXCEPT BY ITS OWN CONSENT; and when he avails himself of this consent, he must pursue the remedy which the law has provided. *Id.*
4. STATE STATUTE IS REGULATION OF INTERSTATE COMMERCE, AND IS UNCONSTITUTIONAL AND VOID as to a citizen of another state soliciting orders for goods to be delivered from that state, where it provides for the licensing of traveling merchants and salesmen, and makes it a misdemeanor for them to carry on their business without first obtaining a license. *Ex parte Robichaux*, 901.

See HABEAS CORPUS.

CONTRACTS.

IN ACTION FOR RESCISSION OF CONTRACT FOR EXCHANGE OF HORSES on the ground of defendant's fraud, the defendant cannot set up the fraud of the plaintiff as a defense. *Whitworth* v. *Thomas*, 725.

See CORPORATIONS, 34, 35; EQUITY, 3.

CONVERSION.

See CORPORATIONS, 16, 17; TROVER.

CORPORATIONS.

1. TERM "FRANCHISE" IN ITS APPROPRIATE AND LEGAL SENSE IS CONFINED to such rights and privileges as are conferred upon corporate bodies by legislative grant. It is the right or privilege of being a corporation, and of doing such things, and such things only, as are authorized by the corporation's charter. *Fletcam* v. *Hay*, 492.

2. FRANCHISE, OR RIGHT TO BE AND ACT AS ARTIFICIAL BODY, IS VESTED in the individuals who compose the corporation, and not in the corporation itself. *Id.*

3. CORPORATION AGGREGATE IS ARTIFICIAL BEING CREATED BY LAW, and composed of individuals who subsist as a body politic under a special denomination, with the capacity of perpetual succession, and of acting, within the scope of its charter, as a natural person. The corporate body, for most purposes, has a distinct identity from that of the individual corporators. *Id.*

4. CORPORATION, IN ABSENCE OF STATUTORY AUTHORITY, HAS NO RIGHT to sell or transfer its franchise, or any property essential to its exercise, which it has acquired under the law of eminent domain. *Id.*

5. RELATION OF STOCKHOLDERS TO CORPORATION whose stock they hold is that of contract, and all the rights and duties of both parties grow out of contract implied in the subscription for stock, construed by the provisions of the charter or articles of incorporation. *Supply Ditch Co.* v. *Elliott*, 586.

6. CORPORATION IS TRUSTEE FOR ITS STOCKHOLDERS, and is bound to protect their interests. *Id.*

7. CERTIFICATES OF STOCK ARE ASSIGNABLE, and pass by indorsement as bills of exchange and promissory notes pass, and holders of such certificates are *prima facie* presumed to be the *bona fide* owners, and an innocent purchaser thereof for value will hold them against the true owner, where the latter has placed it in the power of the assignor to perpetrate a fraud upon the innocent assignee. *Id.*

8. CORPORATION IS ORDINARILY JUSTIFIED in treating the assignee and holder of certificates of stock as the legal and equitable owner thereof. *Id.*

9. TRANSFER OF STOCK BY CORPORATION upon its books, in the absence of the original certificate, is made at its peril, and the real owner of the stock, evidenced by such certificate, loses nothing thereby. But upon the stock so issued by wrong or mistake, the corporation is liable to a *bona fide* holder thereof. *Id.*

10. DIRECTORS OF CORPORATION HAVE POWER TO MAKE CALLS or assessments on the corporate stock without showing that they are made for a corporate purpose, or that the business of the corporation required them to be made and paid, and this whether the statute confers such power, or whether it is entirely silent on the subject. *Budd* v. *Multnomah St. R'y Co.*, 169.

11. ALL THAT IS NECESSARY TO MAKE CALL or assessment on corporate stock is some act or resolution by the directors which evinces a clear official intent to render due and payable a part or all of the unpaid subscription. *Id.*

12. NECESSITY OF CALL OR ASSESSMENT ON CORPORATE STOCK is not open to question by the stockholders, but must be determined by the directors themselves. *Id.*

13. CORPORATION HAS NO INHERENT POWER to forfeit or sell shares of stock owned by delinquent stockholders. That is not a common-law remedy, and can only be exercised when it is expressly conferred by some statute. *Id.*

14. DIRECTORS OF PRIVATE CORPORATION HAVE POWER, under Hill's Oregon Code, section 3221, subdivision 6, to pass by-laws providing for the sale of delinquent stock for unpaid assessments, provided such by-laws are "not inconsistent with any existing law," but a resolution especially directed against the interests of any single delinquent stockholder is in no sense a by-law. The majority of directors cannot enforce the payment of a call or assessment, only in a particular instance, designated by resolution. *Id.*

15. BY-LAW OF CORPORATION PROVIDING FOR SALE of delinquent stock assessments must be reasonable and general. It must affect all delinquent stockholders and all delinquent stock alike, and must not be directed against the stock or interests of a particular named stockholder. *Id.*

16. MEASURE OF DAMAGES FOR WRONGFUL CONVERSION OF DELINQUENT STOCK is its value at the time of conversion or within a reasonable time thereafter, but an exception to this rule exists when the stockholder has suffered only a technical conversion without loss, and then only nominal damages can be recovered. *Id.*

17. GENERAL RULE OF DAMAGES FOR WRONGFUL CONVERSION of delinquent stock is compensation; the stockholder should recover such sum as will compensate him for the injury suffered by the wrong of the corporation. *Id.*

18. CAPITAL STOCK OF CORPORATION, AND ESPECIALLY UNPAID SUBSCRIPTIONS THERETO, IS TRUST FUND for the benefit of its general creditors. *Thompson* v. *Reno Savings Bank*, 797.

19. CERTIFICATE OF INCORPORATION IS MADE FOR BENEFIT OF PUBLIC, and not for the corporation or its stockholders; and those who participated in the incorporation, and, by a certificate made in pursuance of the statute, announced the amount of the capital stock of the corporation, cannot, as against its creditors, contradict the certificate. *Id.*

20. SECRET ARRANGEMENT BETWEEN CORPORATION AND ITS STOCKHOLDERS, BY WHICH RESPONSIBILITY OF STOCKHOLDERS IS MADE LESS than it appears to be under the articles of incorporation, is void as against creditors of the corporation. *Id.*

21. ONE WHO SIGNS CERTIFICATE OF INCORPORATION AS SUBSCRIBER TO SHARES OF STOCK OF CORPORATION cannot afterwards, as against its creditors, deny such subscription, especially after having participated in its profits in accordance therewith. *Id.*

22. STOCKHOLDER, WHO IS CREDITOR OF CORPORATION, CANNOT SET OFF INDEBTEDNESS OF CORPORATION against the amount of his unpaid subscription, in a suit against him by a creditor of the corporation, to subject the unpaid subscription to the satisfaction of the plaintiff's claim. *Id.*

23. STOCKHOLDER, WHO IS CREDITOR OF CORPORATION, MUST PAY AMOUNT OF HIS UNPAID SUBSCRIPTION, and surrender his collateral securities upon the failure of the corporation, and he can then participate in the fund ratably with the other creditors. *Id.*

24. STOCKHOLDER MAY BE SUED BY CREDITOR OF CORPORATION TO SUBJECT UNPAID SUBSCRIPTION TO SATISFACTION OF HIS JUDGMENT without making the other stockholders parties defendant. If the stockholder so sued be required to pay more than his proportionate share of the debts, his remedy is against the other stockholders owing unpaid subscriptions for contribution. *Id.*

25. CREDITOR OF CORPORATION MAY SUE FOR BENEFIT OF HIMSELF, AND OTHER CREDITORS who may choose to come in, establish their claims, and contribute to the expense of the suit, to subject the unpaid subscription of a stockholder to the satisfaction of their claims under the equity practice, and under section 1077 of the Nevada Compiled Laws, which provides that when the question is one of common or general interest of many persons, one or more may sue or defend for the benefit of all. *Id.*

26. COMPLAINT FILED BY CREDITOR OF CORPORATION, IN HIS OWN INTEREST, TO REACH UNPAID SUBSCRIPTION OF STOCKHOLDER, MAY BE AMENDED so that the suit shall be for the benefit of himself, and other creditors who may choose to come in, establish their claims, and contribute to the expense of the suit. *Id.*

27. CREDITOR OF CORPORATION IS NOT OBLIGED TO GIVE NOTICE TO OTHER CREDITORS, or obtain their consent to the commencement of a suit for the benefit of himself, and other creditors who may choose to come in, establish their claims, and contribute to the expense of the suit, to reach the unpaid subscription of a stockholder. *Id.*

28. CREDITOR OF CORPORATION MAY MAINTAIN SUIT AGAINST PERSONAL REPRESENTATIVES OF DECEASED SUBSCRIBER TO CAPITAL STOCK to compel the payment of the unpaid subscription of the decedent without presenting the claim to the representatives for allowance, as ordinary claims are required to be presented by the Compiled Laws of Nevada. *Thompson* v. *Reno Savings Bank*, 883.

29. VARIANCE BETWEEN PLEADINGS AND PROOFS IS IMMATERIAL, where suit is brought by a creditor of a corporation against the defendants, as subscribers to the capital stock, to compel the payment of their unpaid subscriptions; but the agreement established is an implied rather than an express agreement, by which the defendants deposited a certain sum of money with the corporation as its business capital, and agreed among themselves not to be liable for any further amount. *Id.*

30. SUIT IN EQUITY CAN BE MAINTAINED BY CREDITOR OF CORPORATION AGAINST SUBSCRIBER TO CAPITAL STOCK to compel the payment of his unpaid subscription, without procuring, or attempting to procure, a formal call to be made; and when the creditors are numerous, and a court of law is incapable of adjusting their rights, relief can only be had in equity. *Id.*

31. ASSIGNMENT FOR BENEFIT OF CREDITORS, MADE BY MAJORITY OF DIRECTORS of a corporation, constituting a legal quorum, is not invalid because two of the directors, being out of the state at the time, failed to receive actual notice of the meeting. *Chase* v. *Tuttle*, 64.

32. CONNECTICUT ACT OF 1876, WHICH PROVIDES that any one of the directors or executive officers of a corporation owning stock in another corporation may be elected a director of the latter, was not repealed by the

joint-stock act of 1880, providing that the affairs of every joint-stock association shall be managed by three or more directors, "who shall be stockholders in the corporation"; and the executive officer or chief manager of a corporation, which holds stock in another corporation, is a "stockholder" within the meaning of the two acts. *Id.*

33. CORPORATION — NOTICE OF DIRECTORS' MEETING. — The record of the meeting of directors, at which an assignment for the benefit of creditors was made, ran as follows: "At a special meeting of the directors, called for the purpose of making an assignment for the benefit of all the creditors, pursuant to the statutes," etc.: *held*, that, upon this record, until the contrary was shown, it would be presumed that the purpose of the meeting was specified in the notice sent to the respective directors. *Id.*

34. CONTRACT MADE BY OR WITH CORPORATION, IF BEYOND ITS CORPORATE POWER, is not enforceable, and the other party is not estopped from invoking the defense of *ultra vires;* but if the contract be within its corporate power, the other party is estopped from disputing the regular and complete organization of the corporation. *Sherwood* v. *Alvis*, 695.

35. CONTRACT MADE BY FOREIGN CORPORATION IS NOT VOID, AND MAY BE ENFORCED, in Alabama, although it was entered into in disregard of the constitutional prohibition (Ala. Const., art. 14, sec. 4) declaring that no foreign corporation shall do any business in the state without having a resident agent and a known place of business; and the other party to the contract is estopped from pleading its invalidity on this account, after having received the benefits. *Id.*

36. FINDING THAT AGENT OF CORPORATION ACTED IN RELIANCE upon a record of release of a mortgage, without knowledge that it had been paid, is a sufficient finding that the corporation had no notice of the fact that the mortgage had not been paid. *Connecticut M. L. I. Co.* v. *Talbot*, 655.

37. EVERY PERSON DEALING WITH CORPORATION IS BOUND TO TAKE NOTICE of the provisions of its charter, constitution, and by-laws, and its ways of doing business. *Bocock* v. *Alleghany Coal and Iron Co.*, 128.

38. CORPORATION — NOTICE OF CHARTER AND BY-LAWS. — Certain persons entered into a contract to sell land to a corporation through one D., whom they took to be its authorized agent. The corporation declined to consummate the purchase, and denied that D. had any authority, under its constitution and by-laws, to bind it by his contracts. In an action to compel the specific performance of the contract on the part of the corporation, D. and others, the complainants, failed to prove D.'s authority to bind the corporation. *Held*, that the complainants were bound to ascertain whether or not D. had authority to bind the corporation, under its constitution and by-laws, failing in which, they dealt with him as its supposed agent at their own peril, and cannot be heard to complain of the corporation's refusal to assume the responsibility of his unauthorized purchase. *Id.*

39. CONNECTICUT GENERAL STATUTES, PAGE 417, SECTION 7, OF 1875, permit individuals to unite as a voluntary association, under a distinguishing associate name, for trading purposes, but they do not thereby acquire either corporate powers or immunity from individual liability. *Davison* v. *Holden*, 40.

40. UNDER CONNECTICUT STATUTE (Gen. Stats. 1875, p. 403, sec. 9), it is optional with creditor of a voluntary association to proceed against the association as such, or against the individual members composing it. In

the former case, he can levy only on the property of the association; in the latter, execution will go against individual property. *Id.*

41. VOLUNTARY ASSOCIATION — LIABILITY OF MEMBERS. — The defendants, with others, associated themselves under the name of the Bridgeport Co-operative Association, unincorporated, and established a retail meat market. Their purpose was to sell to any person who would buy, regardless of membership, and to the members at such a price as would relieve them from paying at least one middle-man's profit. No profits were anticipated beyond payment of the expenses of management. The members held meetings and elected officers, and the latter employed the defendants as managers to conduct the business. As such managers they bought and sold, paying the receipts to the treasurer. *Held*, that the individual members of the association were liable for goods sold to the association, upon request of the managers, although they never held themselves out as partners, or as being liable as individuals, for the obligations of the association. *Id.*

See COMMON CARRIERS; JURISDICTION, 9, 10; MORTGAGES; RECEIVERS.

COSTS.

See ATTORNEYS AT LAW.

CO-TENANCY.

1. TENANT IN COMMON CANNOT ACQUIRE RIGHT OF HOMESTEAD TO GOVERNMENT LAND of which he is in possession for himself and his co-tenants. *Reinhart* v. *Bradshaw*, 886.

2. SOLE USE AND OCCUPATION OF COMMON PROPERTY BY ONE TENANT IN COMMON does not create the relation of landlord and tenant between him and his co-tenant, nor render him liable for rent, whether the property be real or personal. *Hamby* v. *Wall*, 218.

COUNTIES.

WHERE COUNTY IS EMPOWERED BY STATUTE to purchase and hold lands lying within its own limits, it may take and hold property for a public or charitable purpose, though the deed is taken for some purpose not previously pointed out or authorized by statute. *Raley* v. *Umatilla Co.*, 142.

See CONDITIONS, 1.

COVENANTS.

See VENDOR AND VENDEE.

CRIMINAL LAW.

1. PRISONER IS IN JEOPARDY IN CRIMINAL CASE, when in a court of competent jurisdiction a jury is impaneled and sworn to try him under an indictment sufficient in form and substance to sustain a conviction. He is then entitled to a verdict which will bar further prosecution for the same offense, and an unnecessary discharge of the jury without his consent does not deprive him of the right to the bar. *State* v. *Ward*, 213.

2. CONSENT OF PRISONER THAT JURY MAY SEPARATE DURING RECESS OF COURT is not a consent that one of the jurors may absent himself and necessitate the discharge of the jury. *Id.*

3. DEFENDANT HAS NOT BEEN IN JEOPARDY BY ANY PROCEEDING SHORT OF VERDICT OR JUDGMENT, where the indictment was so defective that the

defendant, if found guilty, would have been entitled to have the judgment entered thereon reversed for error. *Id.*

4. EVIDENCE. — ALL CONFESSIONS ARE PRIMA FACIE INVOLUNTARY and inadmissible, and can be rendered admissible only by showing that they are voluntary, and not constrained. *Amos* v. *State*, 682.

5. IT WILL BE ASSUMED THAT INTENTION WAS TO CHARGE BUT ONE OFFENSE, where all the counts in an information are manifestly based upon one and the same transaction. *State* v. *Glidden*, 23.

6. COMBINATION OF TWO OR MORE PERSONS TO COMMIT CRIME OR MISDEMEANOR, or to effect a lawful purpose by unlawful means, is itself an offense. *Id.*

7. IT IS CRIMINAL OFFENSE for two or more persons, corruptly or maliciously, to confederate and agree together to deprive another of his liberty or property. *Id.*

8. ACTS OF PERSONS IN COMBINING TOGETHER TO INTIMIDATE EMPLOYER, and to compel him against his will to discharge his workmen, and employ such other persons as the conspirators should name, fall within the prohibition of the Connecticut act of 1878, chapter 92, which subjects to a fine or imprisonment "every person who shall threaten or use any means to intimidate any person, to compel such person, against his will, to do or abstain from doing any act which such person has a legal right to do, or shall persistently follow such person in a disorderly manner, or injure or threaten to injure his property, with intent to intimidate him." *Id.*

9. CONSPIRACY — CORRUPT AND MALICIOUS CONDUCT. — An information alleged that the defendants conspired to threaten and use means (the boycott) to intimidate the Carrington Publishing Company, to compel it, against its will, to abstain from doing an act (to keep in its employ workmen of its own choice) which it had a legal right to do, and to do an act (employ the defendants and such persons as they should name) which it had a legal right to abstain from doing: *held*, that, looking at the transaction as it appeared on the face of the information, the defendants' purpose was to deprive the publishing company of its liberty to carry on its business in its own way, although in doing so it interfered with no right of the defendants; the motive was to gain an advantage unjustly and at the expense of others, and therefore the act was legally corrupt; and as a means of accomplishing the purpose, the parties intended to harm the publishing company, and therefore it was malicious. *Id.*

10. ID. — CRIME IN OPPRESSING WORKMEN. — The information further alleged that another purpose of the defendants was to injure and oppress certain workmen of the publishing company: *held*, that a crime was charged, within the contemplation of the statute. *Id.*

11. ID. — CRIME IN EXTORTING MONEY. — The information also alleged that one object of the defendants was to extort money from the publishing company by unlawful means: *held*, that a crime was charged. *Id.*

12. ID. — WHOLESALE BOYCOTTING. — It was charged that the defendants not only attempted to injure the publishing company, but also contemplated the "wholesale boycotting" of all the patrons of that company: *held*, that such conduct must be regarded as *prima facie* malicious and corrupt. *Id.*

13. ID. — TERM "BOYCOTT" DEFINED. — The means by which it is generally sought to accomplish a boycott are not only unlawful, but are in some degree criminal. *Id.*

14. ID. — ADMISSIBILITY IN EVIDENCE OF DECLARATIONS OF CO-CONSPIRATOR. — One of the conspirators, not a defendant, made declarations to a workman in the employ of the publishing company, that if they, the conspirators, had another battle, the publishing company would have to pay the expenses of the boycott. The purpose was to induce the workman to join the conspiracy. *Held*, that the declarations might be regarded as acts in the prosecution of the object of the conspiracy, and as such they were admissible. *Id.*

15. ID. — EVIDENCE, RELEVANCY OF. — After the introduction of evidence to prove that the defendant Glidden had been active in attempting to induce the public not to patronize the publishing company, a witness testified that he saw two persons, one of whom was Glidden, walking up and down one of the most frequented streets, in company and close together, and that from between them copies of a circular urging the public to boycott the publishing company were from time to time dropped on the sidewalk, but the witness was unable to say which of the two dropped them: *held*, that the testimony was properly admitted, and upon that evidence the jury might well find that Glidden distributed the circulars. *Id.*

16. ID. — EVIDENCE AS TO WHAT WAS DONE IN FORMER BOYCOTT. — The same defendants had previously been active in boycotting a paper called the News; and it appeared that in carrying out the conspiracy against the publishing company frequent reference was made to the News boycott, the conspirators proclaiming their purpose to pursue the same general policy against the publishing company, including a demand that the expenses should be paid: *held*, that the effect of the references to the News boycott was a threat, and to enable the jury to appreciate the full force of the threat, evidence was admissible to show what was done in that case. *Id.*

17. ID. — EVIDENCE PROPERLY EXCLUDED. — A witness for the state testified to an interview which he had with the proprietors of the News, relative to the payment of expenses by them. On cross-examination the witness was asked to state what the defendant Glidden had said to him in regard to the same matter at a subsequent time, the state having made no allusion to it on the direct examination. *Held*, that the evidence was inadmissible. *Id.*

18. ID. — TESTIMONY OF CO-CONSPIRATOR, NOT DEFENDANT. — One of the conspirators, not a defendant, was called by the state for the purpose of proving that he had printed circulars used by the defendants in the boycott of the publishing company. The witness declined to testify, on the ground that his testimony would tend to criminate himself. The judge of another court was then called to testify what the witness had sworn to in reference to the matter on the trial of another case before him. *Held*, that the testimony was properly admitted. *Id.*

19. ID. — ADMISSIONS OF CONSPIRATORS. — A witness for the state testified that she overheard a conversation among five or six printers, members of the Typographical Union, which commenced the boycott, and among whom was one of the defendants, the others not identified, in which it was stated, but by whom she could not say, that they were paying fifty cents a week for the expenses of the boycott, and that it would be paid for by the publishing company: *held*, that the evidence was admissible, not only against the defendant, who was present, but against the other defendants as well. *Id.*

20. DISTINCTION BETWEEN ACCESSARIES BEFORE THE FACT AND PRINCIPALS is abolished by the statutes of Illinois. *Spies* v. *People*, 220.

21. ACCESSARIES BEFORE THE FACT MAY BE INDICTED AND PUNISHED AS PRINCIPALS, under the statutes of Illinois. *Id.*

22. THOSE WHO ADVISE, ENCOURAGE, AID, OR ABET THE KILLING OF ANOTHER are as guilty as though they took his life with their own hands. *Id.*

23. ORDINARY LAW OF CONSPIRACY IS APPLICABLE TO PERSONS who have formed a common purpose and are united in a common design to aid and encourage the murder of another. *Id.*

24. THE INTERNATIONAL WORKINGMEN'S ASSOCIATION OF CHICAGO WAS AN UNLAWFUL CONSPIRACY. Its purpose was unlawful, because it included a social revolution, by which the right of individuals to own property should be destroyed, and war should be made upon the police and militia as the defenders and protectors of the right of property. Its methods were also unlawful, because they involved the arming and drilling of groups of men, in violation of the laws of the state. *Id.*

25. EVIDENCE. — ACTS AND DECLARATIONS OF ONE OF SEVERAL PERSONS who have combined to commit a crime, if done or made in furtherance of the common design, are, in contemplation of law, the acts and declarations of all. *Id.*

26. A CONSPIRACY TO COMMIT A CRIME MAY BE CONSUMMATED, and the conspirators become guilty thereof, although the plan is not executed in exact accordance with the original conception. Hence, if A hire B to shoot C at a certain hotel, but C, seeing B enter another hotel on the same night, shoots him there, A is guilty of aiding, abetting, advising, and encouraging the shooting of C. *Id.*

27. PROOF OF CONSPIRACY. — COMMON DESIGN IS THE ESSENCE of the charge of conspiracy; but it is not necessary to prove that the defendants came together, and actually agreed in terms to have that design, and to pursue it by common means. If it be proved that they pursued, by their acts, the same object, often by the same means, one performing one part and another another part of the same, so as to complete it, with a view to the attainment of the same object, a jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object. *Id.*

28. MURDER IS THE UNLAWFUL KILLING OF A HUMAN BEING in the peace of the people, with malice aforethought, either express or implied. *Id.*

29. MALICE IS ALWAYS PRESUMED, where one person deliberately injures another. It is the deliberation with which an act is performed that gives it character. It is the opposite of an act performed under uncontrollable passion, which prevents all deliberation or cool reflection in forming a purpose. *Id.*

30. MALICE AND DELIBERATION ARE PROPERLY INFERRED against one who manufactures a bomb or other implement with the intent that it shall be used in killing another person, although he does not know by nor upon what particular individual it may be used, if the intent is that it shall be so used by some member of a particular class of persons upon some member of another class of persons. When a person of the latter class is killed, the guilt is the same as though he had been specially designated by name as the victim. *Id.*

31. MURDER IN EXECUTION OF COMMON DESIGN.—If persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is com-

mitted, all are equally principals in the murder, though at the time of the act some of them were at such a distance as to be out of view, if the murder is in furtherance of the common design. *Id.*

32. PERSONS ENTERING INTO A CONSPIRACY, PREVIOUSLY FORMED, are deemed in law parties to all acts done by other parties, before or afterwards, in furtherance of the common design. It is therefore unnecessary to prove that a person accused of conspiracy to commit a crime was one of those with whom the conspiracy originated, or that he met with the others during the process of the concoction. *Id.*

33. ONE WHO INFLAMES THE MINDS OF OTHERS, AND INDUCES THEM by violent means to do an illegal act, is guilty of such act, though he takes no other part therein. If he contemplated the result, he is answerable, though it is produced in a manner different from that contemplated by him. If he awoke into action an indiscriminate power, he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what he might have foreseen would be the understanding, he is responsible. *Id.*

34. ONE INFLAMING THE MINDS OF OTHERS THROUGH THE NEWSPAPER ORGAN of a society to which they belong is as answerable in a criminal prosecution as though he had so inflamed them by spoken words. *Id.*

35. WHERE PUBLICATIONS MADE IN A NEWSPAPER ADVISING AND INCITING persons to commit a crime are almost immediately succeeded by the commission of such crime, the jury are at liberty to consider such publications in connection with all the other facts and circumstances of the case, and as a part of those facts and circumstances, with a view of determining whether the persons responsible for the publications did or did not join in a conspiracy to commit such crime. *Id.*

36. A CONSPIRACY IS a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose by criminal or unlawful means. The accused need not be an original contriver of the mischief. He may become a partaker in it by joining the others while it is being executed. If he concurs, no evidence of an agreement to concur is necessary. *Id.*

37. A CONSPIRACY MAY BE PROVED BY CIRCUMSTANTIAL EVIDENCE; in other words, the joint assent of minds, like all other parts of a criminal case, may be established as an inference of the jury from other facts proved. *Id.*

38. ONE WHO LENDS HIMSELF TO THE EXECUTION OF A CONSPIRACY BY PARTICIPATING IN A JOINT ATTACK on others, in the course of which he uses a deadly weapon without known effect, but one of his fellow-conspirators kills one of the persons attacked by throwing a bomb, is as guilty of murder as is the thrower of the bomb, because all the conspirators had a murderous intent, and were all using deadly weapons in pursuance of a common design to destroy life. *Id.*

39. ONE WHO PERSONALLY TAKES NO PART IN AN OFFENSE IS NEVERTHELESS GUILTY of it if he purposely excited another to commit it, as where he, by haranguing people, inflamed them to a riot or other crime. *Id.*

40. IF ONE MAKES SPEECHES TO EXCITE AND INFLAME OTHERS THERE ASSEMBLED to the number of three or more, with a view to incite them to acts of violence, and if that same meeting is so connected in point of circumstances with a subsequent riot that the latter cannot reasonably be severed from the incitement used, he is guilty of riot, though not present when it occurs. It is a question for the jury whether the riot that took

place was so connected with the inflammatory language that they cannot reasonably be separated by time or other circumstances. *Id.*

41. ANY ACT OF ONE OF SEVERAL CONSPIRATORS IN THE PROSECUTION OF THEIR ENTERPRISE is considered the act of all. *Id.*

42. A PRINCIPAL IN THE CRIME OF MURDER NEED NOT BE SPECIFICALLY A PARTY TO THE KILLING, if he is present and consenting to the assemblage by which it is perpetrated in pursuance of the common design. *Id.*

43. ONE MAY BE GUILTY OF A WRONG WHICH HE DID NOT SPECIFICALLY INTEND if it came naturally or even accidentally through some other specific or a general evil purpose. Therefore, when persons combine to do an unlawful thing, if the act of one proceeding or growing out of the common plan terminates in a criminal result, though not the particular result meant, all are liable. *Id.*

44. ABSENCE OF SPECIAL MALICE AGAINST THE PERSON SLAIN, or of deliberate intention to hurt him, if the killing was committed in the prosecution of an original unlawful purpose, will not exonerate any of the conspirators from the guilt of him who gave the fatal blow. *Id.*

45. EACH CONSPIRATOR IS RESPONSIBLE FOR THE MEANS EMPLOYED BY ANY OF HIS FELLOW-CONSPIRATORS in accomplishing the unlawful purpose in which all are engaged, where the means to be used in the furtherance of such purpose are not previously specifically agreed upon or understood. *Id.*

46. EACH CONSPIRATOR IS PRESUMED TO HAVE ASSENTED TO THE DOING OF WHATEVER would reasonably or probably be necessary to accomplish the objects of the conspiracy, even to the taking of life, where the objects of the conspiracy are to do such unlawful acts as will probably result in the unlawful taking of human life. *Id.*

47. THE INTERNATIONAL WORKINGMEN'S ASSOCIATION OF CHICAGO WAS AN ILLEGAL ORGANIZATION, engaged in making bombs and drilling with arms for the unlawful purpose of attacking the police if the latter should assume to do their duty in the protection of the public peace. Its members were conspirators, and by their act of conspiring together they jointly assumed to themselves, as a body, the attributes of individuality, so far as regards the prosecution of the common design. *Id.*

48. EVIDENCE. — THE UTTERANCES OF NEWSPAPERS AND SPEAKERS ARE ADMISSIBLE IN EVIDENCE against persons on trial for murder, to show the intentions and purposes of a society, when it appears that such persons were members of such society, and that such speakers and newspapers were the spokesmen and organs thereof. *Id.*

49. EVIDENCE. — THE ACTS AND DECLARATIONS OF PARTIES TO A GENERAL CONSPIRACY are admissible in evidence, if they precede and lead up to a special plot or conspiracy in the prosecution of which a crime is committed. *Id.*

50. EVIDENCE. — A BOOK MAY BE ADMITTED IN EVIDENCE against defendants on trial for murder of a policeman, when it appears that it was circulated by an organization of which they were members, and was one of the methods by which the organization instructed and advised its members to get ready for the murder of the police. When the leaders of the organization thus used the book, they adopted it as a manual of tactics, and it became a book of their written advice and instruction to their followers; and was competent evidence to establish the purposes and objects which they had in view, and the methods by which they proposed to accomplish those objects. *Id.*

51. CROSS-EXAMINATION.—A LETTER WRITTEN TO AND RECEIVED BY A DEFENDANT on trial for murder is properly received in evidence against him, as part of his cross-examination as a witness on his own behalf, if it tends to test the sincerity of a claim made by him on his direct examination that he had no serious or unlawful object in view in keeping dynamite and other articles, or to show that he and its author were engaged in the business of supplying dynamite to discontented laboring men. *Id.*

52. ON CROSS-EXAMINATION OF PERSON ON TRIAL FOR MURDER, who has offered himself as a witness to disprove the charge made against him, he cannot refuse to answer a question on the ground that by so doing he will criminate himself. To affect his credibility he may also be asked whether he has been concerned in other crimes, part of the same system. *Id.*

53. EVIDENCE.—BOMBS, AND CANS CONTAINING DYNAMITE AND PREPARED WITH CONTRIVANCES for exploding it, are receivable in evidence against persons charged with murder committed by throwing a bomb among policemen, in pursuance of a conspiracy, as specimens of the kind of weapons the defendants and their associates were preparing, and as showing the malice and evil heart which the intended use of such weapons indicated. The jury have a right to see them for the further purpose of comparing them with the descriptions of the bomb by which the deceased was killed, with a view of determining whether it was made by any of the defendants. Bombs and cans found buried near one of the designated meeting-places of the conspirators are also admissible for the purpose of showing the nature and character of the conspiracy, and its connection with the events which transpired on the night appointed for the meeting. Though the bombs and cans are not shown to have been placed by the defendants at the place where they were found, it was for the jury to say whether, under all the circumstances, any others than the members of the conspiracy had undertaken to make such weapons or knew anything about them. *Id.*

54. THE DECLARATIONS OF A CONSPIRATOR WHICH MAY BE RECEIVED IN EVIDENCE AGAINST HIS CO-CONSPIRATORS must be restricted to such as are made in furtherance of the common design. Declarations which are merely narrative as to what has been or will be done are competent evidence only against those by or in whose presence they were made. *Id.*

55. THAT THE ACTS AND DECLARATIONS OF ONE CONSPIRATOR WERE RECEIVED IN EVIDENCE AGAINST THE OTHERS before proof of the conspiracy or of their connection with it was made is immaterial, if, from the whole evidence received at the trial, such conspiracy and their connection with it is shown to have existed. The order in which the evidence may be received is largely within the discretion of the trial judge. The prosecutor may either prove the conspiracy, which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. The term "acts" as here used includes written correspondence and other papers relative to the main design. *Id.*

56. IDENTITY OF PERSON WHO THREW A BOMB BY WHICH ANOTHER WAS KILLED need not be established on a trial for murder, if it sufficiently appears that he and the defendants on trial were all members of a conspiracy to unlawfully resist the officers of the law, and that he threw such bomb in pursuance of the conspiracy and in furtherance of the common object. *Id.*

57. MEMBERSHIP IN A CONSPIRACY MAY BE PROVED WITHOUT SHOWING THE NAME OR DESCRIPTION OF THE ALLEGED MEMBER. Hence, where several persons are on trial for murder, and the act causing the death of the deceased was committed by another person, with whom it is claimed that the defendants conspired to commit such murder, the fact that he, though his name and personal description are unknown, was a member of such conspiracy, is sufficiently established by evidence tending to show that he threw a bomb made by an agent of the conspiracy, obtained from a place where only a member could have obtained it, and at a time when no one but a member would have sought it; and that he threw it at a meeting appointed by the conspiracy, from the midst of a company of persons belonging to the conspiracy, upon the happening of a contingency provided for, and as part of an attack planned by the conspiracy. *Id.*

58. ONE MAY BE ACCESSARY TO AN UNKNOWN PRINCIPAL in the perpetration of a crime. If the principal felon is unknown, the indictment of the accessary may state it accordingly. If there are two counts in the indictment, one charging the principal to be known and the other charging him to be unknown, it is sufficient if either is proved. *Id.*

59. CHARGING ACCESSARY AS PRINCIPAL. — Under the statutes of Illinois, one who, not being present aiding, abetting, or assisting, hath advised, encouraged, aided, or abetted the perpetration of a crime, may be indicted and punished as a principal. The indictment against him need not say anything about his having abetted either a known or an unknown principal. *Id.*

60. THE INSTRUCTIONS GIVEN TO THE JURY MUST BE CONSIDERED AS A WHOLE. If the appellate court can see that an instruction, although not stating the law correctly, is qualified by others, so that the jury were not likely to be misled, the error will be obviated. This rule does not contravene the rule that, in a criminal case, material error in one instruction calculated to mislead is not cured by a subsequent contradictory instruction. *Id.*

61. GUILT OF MURDER ARISING FROM GENERAL ADVICE. — If the defendants, as a means of bringing about a social revolution, and as a part of a larger conspiracy to effect such revolution, also conspired to excite classes of workingmen in a city to sedition, tumult, and riot, and to the use of deadly weapons and taking of human life, and for the purpose of producing such tumult, riot, use of weapons, and taking of life, advised and encouraged such classes by newspaper articles and speeches to murder the authorities of the city, and a murder of a policeman resulted from such advice, then the defendants are responsible therefor, and guilty of the crime of murder. *Id.*

62. REASONABLE DOUBT. — When instructing jurors upon the subject of reasonable doubt, it is not error for the court to say to them: "You are not at liberty to disbelieve as jurors if from the evidence you believe as men." *Id.*

63. UNDER A STATUTE DECLARING THAT JURIES IN ALL CRIMINAL CASES SHALL BE JUDGES OF THE LAW AND FACT, the court may tell the jurors that if they can say upon their oaths that they know the law better than the court, they have the right to do so, but that before saying this, upon their oaths, it is their duty to assure themselves that they are not acting from caprice or prejudice, and to reflect whether from their study and experience they are better qualified to judge of the law than the court. *Id.*

64. A CONSPIRACY TO BRING ABOUT A CHANGE OF GOVERNMENT by peaceful means if possible, but if necessary, by a resort to force, is unlawful. *Id.*

65. ANARCHISTS. — IT IS NOT ERROR TO REFUSE TO INSTRUCT A JURY, that "it cannot be material that the defendants, or some of them, are or may be socialists, communists, or anarchists," when the defendants are on trial for murder, and there is evidence tending to show that such murder was committed in the prosecution of a conspiracy to resist, and if necessary to kill, members of the police or militia, as the representatives of law and government. The fact that defendants were anarchists may properly be considered by the jury, in connection with all the other circumstances of the case, with a view of showing what connection, if any, the defendants had with the conspiracy, and what were their motives in joining it. *Id.*

66. THROWING A DYNAMITE BOMB INTO A BODY OF POLICEMEN CANNOT BE EXCUSED on the ground that they have, in excess of their authority, given an order for persons there assembled to disperse, and the bomb-thrower, being a member of the assemblage, adopts this mode of resisting the invasion of his rights. *Id.*

67. INSTRUCTIONS AS TO THE FORM OF VERDICT CANNOT BE COMPLAINED OF, unless the counsel for the accused prepared an instruction, indicating such form as they deemed to be correct, and asked the trial court to give it, where the court, at the request of defendants, instructed the jury that, under an indictment for murder, the accused might be found guilty of manslaughter, and that it was their duty to so find, if they believed that the defendants, or any of them, were guilty of manslaughter. *Id.*

68. JURY TRIAL. — BY ACCEPTING A JUROR WHILE THE ACCUSED HAVE UNUSED PEREMPTORY CHALLENGES, they are estopped from complaining that he was not impartial. *Id.*

69. JURY TRIAL. — ERROR OF THE COURT IN OVERRULING A CHALLENGE FOR CAUSE will not be reviewed in the appellate court, if the defendant, having any unused peremptory challenges at the time, uses them to exclude from the jury the person so challenged for cause, though during the subsequent progress of the cause all the defendant's peremptory challenges are exhausted before a full jury is finally obtained. No objections will be considered, unless made to jurors who tried the case. *Id.*

70. JURY TRIAL. — A JUROR IS NOT DISQUALIFIED, under the statutes of Illinois, to try a criminal case because he has an opinion, based upon rumor or newspaper statements, if he has expressed no opinion concerning the truth of such rumors or statements, and swears that he can fairly and impartially render a verdict in the case, in accordance with the law and the evidence. *Id.*

71. JURY TRIAL. — STATUTE IS NOT UNCONSTITUTIONAL which declares that, in any trial of a criminal cause, the fact that a person called as a juror has formed an opinion or impression, based upon rumor or newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall, upon oath, state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement. Such statute does not conflict with a provision of the constitution guaranteeing to every accused person a speedy, public trial, by an impartial jury. It merely tends to secure intelligence in the jury-box, and to exclude dense ignorance therefrom. *Id.*

72. JURY TRIAL. — JURORS ARE NOT DISQUALIFIED BY HAVING A PREJUDICE AGAINST SOCIALISTS, COMMUNISTS, AND ANARCHISTS, because such prejudice is merely a prejudice against crime; and a prejudice against a crime, or against mean actions or dishonesty, does not render one incompetent to act as a juror. *Id.*

73. PREJUDICE AGAINST COMMUNISM OR ANARCHISM DOES NOT RENDER A JUROR incapable of fairly and impartially trying the issue, whether the crime of murder has been committed by persons who are claimed to be communists and anarchists. *Id.*

74. JURY TRIAL. — THE SAME NUMBER OF PEREMPTORY CHALLENGES MUST BE CONCEDED TO THE STATE of Illinois, under its statutes, as to the defendants, where several are being jointly tried for the commission of the same crime. *Id.*

75. GRANTING SEPARATE TRIALS TO PERSONS JOINTLY INDICTED IS IN THE DISCRETION of the court, and an order refusing such trial will not be reviewed. *Id.*

76. INTENT OR PURPOSE TO KILL AT TIME OF COMMISSION OF ACT IS ESSENTIAL to constitute the crime of murder, as defined by sections 3 and 4 of the Nebraska Criminal Code, and this intent must be specifically and directly averred as a part of the description of the offense in every indictment for either of those crimes. *Schaffer* v. *State*, 274.

77. REQUIREMENTS OF NEBRASKA STATUTE ARE NOT SATISFIED by an averment in an indictment for murder that the accused "feloniously, purposely, and of deliberate and premeditated malice," did make an assault on the deceased, and that he then and there "feloniously, purposely, and of his deliberate and premeditated malice, did shoot" the deceased with a gun loaded with, etc., inflicting on him a mortal wound, of which he then and there instantly died. In such case the indictment does not charge murder, because the intent or purpose to produce death is nowhere alleged. *Id.*

78. WHERE INDICTMENT FOR MURDER UNDER NEBRASKA STATUTE FAILS TO ALLEGE INTENT or purpose to kill, the defect is not cured by the concluding words of the indictment, "and so the grand jurors aforesaid," etc., do find and say that the accused "did, in manner and form aforesaid, feloniously, purposely, and of his deliberate and premeditated malice, kill and murder" the deceased. Such allegation is but a legal conclusion of the grand jury, drawn from the antecedent averments descriptive of the crime. *Id.*

79. CONCLUDING WORDS OF INSTRUCTION TO JURY ON TRIAL OF INDICTMENT FOR MURDER, held to be unnecessary, and their omission proper in the particular case. *Id.*

80. JURY MAY FIND PRISONER GUILTY OF MURDER IN SECOND DEGREE for a homicide committed by means of poison, for the reason that the question of degree is to be settled by them under the statute of Nevada, which provides that "all murder which shall be perpetrated by means of poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, ... shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree." *State* v. *Lindsey*, 776.

81. JURY HAVE POWER TO FIX CRIME OF MURDER IN SECOND DEGREE when it ought, under the law and the facts, to be fixed in the first degree. *Id.*

82. IF JURY FIX CRIME OF MURDER IN SECOND DEGREE, in a case where the law and the facts make it murder in the first degree, it is an error in favor of the prisoner, of which the law will not take any cognizance, and of which he ought not to complain. *Id.*

83. INSTRUCTIONS ARE NOT ERRONEOUS OR MISLEADING when they are to the effect that if poison was prepared by the prisoner with suicidal intent, and was negligently exposed in such a place and manner as would likely to be unconsciously or without negligence taken by the decedent, the prisoner would be "liable for the consequences," the court in the same connection stating correctly what the consequences would be. *Id.*

84. EVIDENCE — ACTS OF CO-CONSPIRATORS. — Where three persons were present when the deceased came to his death by violence, inflicted by one or more of them, the others aiding, encouraging, or giving countenance to the deed, or ready to assist if necessary, whether present for the purpose by preconcert, or entering into the common illegal purpose at the time, all are equally guilty, and the acts of each may be proved against all, or any number of them; and the existence of such preconcert, conspiracy, or common purpose, is for the jury to determine. *Amos* v. *State*, 682.

85. CRIMINAL LAW — CHARGING JURY AS TO MURDER IN FIRST DEGREE. — It is not error to charge the jury that the four elements necessary to constitute murder in the first degree under the Alabama statute (Code, sec. 4295) are all embraced in the words "formed design," but it is better to charge in the language of the statute. *Id.*

86. CRIMINAL LAW. — TO SUSTAIN PLEA OF SELF-DEFENSE in case of homicide, there must be shown a present pressing necessity, real or apparent, to protect the life of the defendant, or his person from great bodily harm; he must not be the aggressor nor provoke nor encourage the rencontre; and he must retreat from the combat, if there be a mode of escape consistent with his safety. A charge asked which omits either of these requisites to a sufficient hypothesis may be properly refused. *Brown* v. *State*, 685.

87. SAME — SELF-DEFENSE — BURDEN OF PROOF. — USE OF DEADLY WEAPON RAISES PRESUMPTION OF MALICE, and casts on the defendant the burden of repelling such presumption, when it is not rebutted or overcome by the evidence which proves the killing. The *onus* to prove a present pressing necessity, real or apparent, to take life is on the defendant; but when he shows this, the prosecution may avoid the effect by proving that the defendant was at fault in bringing on the difficulty, or could have reasonably escaped. The prosecution holds the affirmative of these negative propositions of the plea of self-defense. *Id.*

88. CRIMINAL LAW — LARCENY. — ELECTION WILL NOT BE COMPELLED where the indictment does not designate a particular act, and there is evidence on the part of the prosecution tending to show more than one act; but when the indictment is so framed as to be adapted to the different phases which the evidence may present of a single transaction particularly charged, an election will be enforced. The principle of election is applicable only when there is evidence of separate and distinct transactions. *Black* v. *State*, 691.

89. SAME. — STRONG PRESUMPTION ARISES, ON PROSECUTION FOR LARCENY, THAT THERE WAS NO FELONIOUS INTENT, if the taking was open and notorious, and there was no subsequent attempt to conceal the property, and no denial, but an avowal of the taking; and this presumption must be repelled by clear and convincing evidence before a conviction is authorized. *Id.*

90. SAME — REASONABLE DOUBT AS TO OWNERSHIP OF PROPERTY ALLEGED TO BE STOLEN. — If, looking at all the evidence, on a prosecution for the larceny of a hog, alleged to be the property of a person whose name is to the grand jury unknown, there exists a reasonable doubt whether the animal found in the defendant's possession belonged to himself or to some other person, this will entitle the defendant to an acquittal. *Id.*

91. EMBEZZLEMENT BY AGENT OR SERVANT. — A mail-rider in the service of the United States government who purloins the money from a registered letter in a mail-bag is not the agent or servant of the person who sent the letter, within the terms of the Alabama Statute, Code of 1886, section 3795, punishing embezzlement by an agent or servant. The term "agent" or "servant," as used in the statute, imports the correlative idea of a principal or master, and implies an employment by virtue of which the money or property came into his possession. *Brewer* v. *State*, 693.

92. CRIMINAL LAW — ARSON. — Phrase "corn-crib containing corn," used in an indictment for arson, includes a "corn-pen containing corn," as the latter words are used in the Alabama statute (Sess. Acts 1885, p. 105) defining arson in the second degree, and the burning is arson in the second degree. *Cook* v. *State*, 688.

93. SAME — WHAT BUILDINGS ARE WITHIN CURTILAGE OF DWELLING-HOUSE. — CURTILAGE USUALLY INCLUDES yard, garden, or field which is near to and used in connection with the dwelling. Many cases arise in which it can be affirmed, as matter of law, that a given house or structure is or is not within the curtilage; but where the testimony is indeterminate in character, the question is properly submitted to the jury. *Id.*

94. MALICIOUS MISCHIEF INCLUDES ALL MALICIOUS PHYSICAL INJURIES TO RIGHTS OF ANOTHER which impair utility or materially diminish value, and is an offense under the common law of this country. *State* v. *Watts*, 216.

95. RAPE CONSISTS IN HAVING UNLAWFUL CARNAL KNOWLEDGE by a man of a woman, forcibly and against her will, and the offense may be committed as well on a woman unchaste, or a common prostitute, as on any other female. Wherever there is a carnal connection, without consent in fact, fraudulently or otherwise obtained, there is in the wrongful act itself all the force which the law demands as an element of the crime. *Bailey* v. *Commonwealth*, 87.

96. CONSENT INDUCED BY FEAR OF BODILY HARM IS NO CONSENT, and though a man lay no hands on a woman, yet if by an array of physical force he so overpowers her mind that she dare not resist, he is guilty of rape by having the unlawful intercourse. *Id.*

97. RAPE, CIRCUMSTANCES UNDER WHICH SEXUAL INTERCOURSE AMOUNTS TO. — The accused entered the bed of the prosecutrix, his fourteen-year-old step-daughter, which was situated in a room in which three younger children were sleeping. There were no other persons in the house, the mother and older sister of the prosecutrix being absent, beyond call and reach. The prosecutrix forbid the accused from getting into bed with her, but made no outcry, and he got in, "held her hands, brought his private parts in contact with her private parts, and forced her." The children in the room were not awakened, a neighbor living one hundred yards distant heard nothing of it, and the prosecutrix made no complaint until nearly a week afterwards. The accused admitted that he had had intercourse with the prosecutrix. The jury found him guilty of rape.

Held, that under the circumstances of the case, the verdict of the jury should not be disturbed. *Id.*

98. PENETRATION IS ESSENTIAL ELEMENT OF CRIME OF RAPE; but proof of the carnal knowledge of a female against her will by force is proof of rape. *Id.*

CURTESY.

HUSBAND CANNOT BE TENANT BY CURTESY OF LANDS OF WHICH HIS WIFE WAS NEVER SEISED; and if he sells his interest, and, as guardian, that of his children also, in lands of his deceased wife, of which he was tenant by the curtesy, and invests the proceeds of the sale in other lands, the title to which he takes to himself as guardian of his children, he will not be entitled to curtesy in the lands so purchased by him. *Bogy* v. *Roberts*, 210.

DAMAGES.

See CORPORATIONS, 16, 17; EMINENT DOMAIN; NEGLIGENCE; NUISANCE; VENDOR AND VENDEE, 2.

DEBTOR AND CREDITOR.

See CORPORATIONS.

DECREES.

See JUDGMENTS.

DEEDS.

1. DESCRIPTION OF LANDS IN DEED, OR IN COMPLAINT, as a particular quarter-section, "except two acres in the southeast corner," is sufficiently certain and definite; the exception in the description being construed to mean two acres in such corner, lying in a square, and bounded by four equal sides. *Green* v. *Jordan*, 711.

2. GRANTORS CANNOT AVOID GRANT on the ground of their illiteracy and want of understanding of its terms, when, though they cannot read and write, they speak the English language reasonably well, are persons of ordinary understanding, and not negligent of their interests, and when the grant was executed it was read and explained to them, and they fully understood its contents and terms. *Bingham* v. *Salene*, 152.

See CHARITABLE USES; CONDITIONS; EVIDENCE, 3; FRAUDULENT CONVEYANCES; STATUTE OF LIMITATIONS, 5; VENDOR AND VENDEE.

DEFINITIONS.

LAW IS SYSTEM OF RULES AND PRINCIPLES, in which the rights of parties are protected and enforced, and it is the duty of a court to disregard mere pretexts, and decide a case, if possible, upon the merits. *Cortelyou* v. *Maben*, 284.

EASEMENTS.

1. GRANT IN PRÆSENTI OF SOLE AND EXCLUSIVE RIGHT AND PRIVILEGE TO SHOOT, take, and kill any and all wild fowl upon and in any lakes, sloughs, or waters situate upon the lands of the grantor, and of the right of ingress and egress to and from said lakes, sloughs, and waters for such purpose, is a grant of a profit *a prendre*, and not a mere revocable license; and while the privilege granted is sole and exclusive, its use is

limited to the places designated, that is, the water lying upon the lands of the grantor, and must be so exercised as not to injure his crops or stock; nor does the grant authorize the indiscriminate giving of permits to numerous persons to exercise the privilege, though the grantee may sell or assign it. *Bingham* v. *Salene*, 152.

2. RIGHTS EXERCISED BY ONE IN SOIL OF ANOTHER, accompanied with participation in the profits of the soil, are termed profits *a prendre*. They differ from easements in that the former are rights of profits, and the latter are mere rights of convenience without profit. *Id.*

See EQUITY, 6.

EJECTMENT.

1. TO SUSTAIN EJECTMENT, OR STATUTORY ACTION IN NATURE OF EJECTMENT, except as against a mere trespasser, the plaintiff must have a legal title at the commencement of the suit, and a title subsequently accruing will not authorize a recovery. *Green* v. *Jordan*, 711.

2. PLAINTIFF IN EJECTMENT, OR STATUTORY ACTION IN NATURE OF EJECTMENT, MAY RECOVER on proof of prior actual possession only as against a mere trespasser in possession, without regard to the validity or sufficiency of the muniments of title offered in evidence to support a recovery. *Id.*

3. TAX RECEIPTS, SHOWING PAYMENT OF TAXES ON LAND BY ONE IN POSSESSION, are admissible in evidence for him as tending to show both a claim of ownership and the extent of the claimants' possession. *Id.*

ELECTIONS.

1. PROPER AND REASONABLE REGISTRATION LAWS ARE VALID, not as imposing upon the elector an additional and necessary qualification, created by statute, but as a method of proving the existence of the qualifications required by the constitution. *State* v. *Corner*, 267.

2. LEGISLATURE MAY REQUIRE REGISTRATION OF QUALIFIED VOTERS, under reasonable restrictions, as proof of the possession of the qualifications prescribed by the constitution; but it should be left within the power of the voter to prove himself to be an elector, and to register and vote at any time prior to the closing of the polls on election day. *Id.*

3. REGISTRATION LAW WHICH ABSOLUTELY DEPRIVES ELECTOR OF RIGHT TO VOTE, unless registered on one of four days, the last one being ten days prior to the election, is void, as violating the provisions of the Nebraska constitution, article 1, section 22, that "all elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." *Id.*

4. NEBRASKA ACT, LAWS OF 1887, CHAPTER 39, ENTITLED "AN ACT TO AMEND THE ELECTION LAWS," etc., is in contravention of that clause of the state constitution (art. 3, sec. 11), relating to the amendment of laws, and is void. *Id.*

EMBEZZLEMENT.

See CRIMINAL LAW.

EMINENT DOMAIN.

1. DAMAGES ARISING FROM APPROPRIATION OF LAND by railroad company, whether prospective or otherwise, must all be recovered in one action. *Indiana B. & W. R'y Co.* v. *Allen*, 650

2. DAMAGES WHICH NATURALLY AND PROXIMATELY RESULT from the construction and operation of a railroad are properly recoverable, but remote or purely speculative damages cannot be recovered. *Id.*

3. JUDGMENT OF DISMISSAL OF PROCEEDINGS FOR ASSESSMENT OF DAMAGES upon the appropriation of private lands by a railroad company is conclusive between the parties upon collateral attack, even though erroneous. *Id.*

4. RAILROAD COMPANY COMING INTO POSSESSION OF LANDS as the successor of a trespasser must pay all damages inflicted by the latter. *Id.*

EQUITY.

1. EQUITY EXERCISES SOUND DISCRETION, without adhering to any inflexible rule, in determining whether there has been a misjoinder of parties. *Fillmore* v. *Wells*, 567.

2. LEGAL TITLE TO LAND CANNOT BE TRIED IN SUIT TO REMOVE CLOUD from the title, and the plaintiffs in such suit asserting the legal title are not entitled to relief against the defendant claiming title as purchaser at a tax sale made under a judgment rendered in an action to which said plaintiffs were not made parties. *Fontaine* v. *Hudson*, 515.

3. UPON BILL FOR REFORMATION OF WRITTEN CONTRACT on the ground of mistake, whether it is necessary to allege and show a prior request for the correction of the mistake, *quære*. *Miller* v. *Louisville & N. R. R. Co.*, 722.

4. EQUITY HAVING ACQUIRED JURISDICTION for one purpose strictly equitable will dispose of the whole controversy, even though, in so doing, it may be called on to administer relief which pertains to courts of common law. *Id.*

5. DECREE IN ACTION TO QUIET TITLE to land operates to determine all claims to interests therein, whatever their form or character, existing at the time the decree is rendered. *Indiana B. & W. R'y Co.* v. *Allen*, 650.

6. EASEMENT CLAIMED BY RAILROAD COMPANY TO CROSS LAND of another will be cut off by a decree in favor of the owner of the land, in an action to quiet the title thereto, where such easement is not protected by the decree. *Id.*

See AGENCY, 5; ATTORNEYS AT LAW; JUDGMENTS.

ESTATES.

COURTS OF LAW TAKE NO COGNIZANCE OF EQUITABLE ESTATES, and deal only with legal titles. *Green* v. *Jordan*, 711.

See CONDITIONS.

ESTATES OF DECEDENTS.

1. WHERE WILL CONFERS POWER OF SALE ON EXECUTOR, the probate court has no jurisdiction to grant an order for the sale of decedent's lands, either for payment of debts or for distribution; and when the petition for sale shows that there is a will, it must affirmatively appear that no power to sell is conferred thereby. *Wilson* v. *Holt*, 768.

2. PURCHASER AT PROBATE SALE WHICH IS FOUNDED upon a petition which does not contain the averments necessary to give the court jurisdiction, acquires no legal title which he can convey; but he may acquire an equity enforceable against the heirs who receive their shares of the purchase-money. *Id.*

3. DEBT OF DEVISEE TO TESTATOR CANNOT BE CHARGED ON LANDS DEVISED TO HIM by the testator, in the absence of language in the will making such debt a charge. *La Foy* v. *La Foy*, 302.

See CORPORATIONS, 28.

ESTOPPEL.

MATTER OF ESTOPPEL IS AS CONCLUSIVE WHEN ADMITTED IN EVIDENCE AS IF PLEADED, when there has been no opportunity to plead it. *Young* v. *Brehe*, 892.

EVIDENCE.

1. WHEN FACT IS PECULIARLY WITHIN KNOWLEDGE OF PARTY, he must produce the necessary evidence to prove it. *Weber* v. *Rothchild*, 162.

2. WHERE TWO WRITINGS RELATE TO THE SAME SUBJECT-MATTER, bear even date, are between the same parties, and executed at the same time, they must be taken together and held to constitute but one entire transaction, in the absence of evidence to the contrary. *Id.*

3. IT IS UNNECESSARY TO PRODUCE DEEDS OR OTHER WRITINGS, or account for their absence, in order to legalize a mere incidental mention of their existence by a witness, no attempt being made to prove their contents or legal effect. *Green* v. *Jordan*, 711.

4. UNANSWERED LETTER IS ADMISSIBLE IN EVIDENCE AGAINST THE PERSON RECEIVING IT, and to whom it was addressed, if it appears to have been invited by him, and to have been written in response to some previous communication by him. *Spies* v. *People*, 320.

5. RULE THAT PAROL EVIDENCE CANNOT BE ADMITTED TO VARY, EXPLAIN, OR CONTRADICT WRITING is confined to the parties to the writing; and when it comes in question collaterally between one of the parties and others, neither party is estopped to contradict or explain it. *Coleman* v. *Pike Co.*, 746.

6. IDENTITY OF NAME IS PRIMA FACIE EVIDENCE of identity of person, and is sufficient proof of the fact, in the absence of all evidence to the contrary. *Wilson* v. *Holt*, 768.

7. THE INTENTIONS OF MEN CAN ONLY BE DETERMINED from their acts. *Spies* v. *People*, 320.

8. OPINION EVIDENCE. — In an action against a railroad company for personal injuries sustained by the plaintiff, caused by a steam-shovel, the testimony of the person who was operating the shovel, that "after it had started, and plaintiff had placed himself under it, no human effort could have prevented the lever or the bucket from swinging to its accustomed place," is not the statement of mere opinion, but of the result of personal observation and knowledge as to a collective fact, and may be properly received in evidence. *Alabama G. S. R'y Co.* v. *Yarbrough*, 711.

9. OBJECTIONS TO EVIDENCE, TO BE OF ANY AVAIL, MUST BE REASONABLY SPECIFIC. It is not enough to state that the evidence is incompetent, immaterial, or irrelevant; but the particular objection must be fairly stated. *Ohio & M. R'y Co.* v. *Walker*, 638.

10. GENERAL OBJECTION TO WHOLE OF WITNESS'S EVIDENCE AS IRRELEVANT must be disregarded, if any part of such evidence is admissible. *St. L., I. M., & S. R'y* v. *Hendricks*, 220.

11. BY DEMURRING TO EVIDENCE, DEMURRANT WAIVES ALL EVIDENCE on his part that conflicts with that of the other party, admits the credit of the evidence demurred to, admits all inferences of fact that may be fairly

deduced from the evidence, and refers it to the court to deduce all fair inferences from the evidence. *Jones* v. *Old Dominion Cotton Mills*, 92.

See CRIMINAL LAW; ESTOPPEL; NEGLIGENCE; NEW TRIAL; PLEADING AND PRACTICE; RAILROADS, 6, 7; SALES.

EXECUTIONS.

1. RIGHT TO EXECUTION FOLLOWS EO INSTANTI, UPON RENDITION OF JUDGMENT. The rendition of the judgment is the judicial act upon which the execution rests. Its entry upon the record is a mere ministerial act evidencing the judicial act, but not essential to its validity, or giving to the judgment any additional force or efficacy. *Fontaine* v. *Hudson*, 515.
2. VALID JUDGMENT RENDERED WILL SUPPORT AND VALIDATE EXECUTION issued in conformity therewith, although the formal record evidence of its rendition may not have existed at the time the execution issued. It is sufficient if the record evidence is in existence when proof of the judgment becomes necessary. *Id.*
3. ACTION FOR DAMAGES DOES NOT LIE against a circuit clerk who wrongfully issued a writ of *venditioni exponas*, commanding the sheriff to sell certain lands in the plaintiff's possession which had been previously levied on by an execution against another. The issue of the writ in such case, and the sale thereunder, did not affect the right, title, or possession of the plaintiff, and the costs, expenses, and attorney's fees necessarily incurred in defense of a suit brought by the purchaser to recover possession of the lands alleged as special damages, not being the natural and proximate consequences of issuing the writ, the action cannot be maintained. *Eslava* v. *Jones*, 699.
4. PURCHASE BY STRANGER IN GOOD FAITH, AT EXECUTION SALE, WILL BE PROTECTED from secret infirmities, and mere inadequacy in price will not avoid such sale, unless knowledge of some vice in the sale or some misconduct or wrongful act on the part of the purchaser be shown. *Carden* v. *Lane*, 228.
5. WHERE SHERIFF'S SALE OF LANDS UNDER EXECUTION IS SET ASIDE, and the deed vacated, after the purchaser has entered into possession, his continued possession thereafter is that of a mere trespasser *Green* v. *Jordan*, 711.
6. MONEY WHICH IS ABSOLUTELY EXEMPT IS NOT SUSCEPTIBLE of fraudulent alienation, and the debtor may make any disposition of it he sees fit, and plead the exemption, which, if proved, is a complete defense to any proceeding to apply the money to the payment of a judgment against him. *Union Pac. R'y Co.* v. *Smersh*, 290.

See EXEMPTIONS.

EXEMPTIONS.

EXEMPTION LAWS OF ONE STATE CANNOT AVAIL DEBTOR in a suit instituted against him in another state; and a garnishee in the latter state cannot make the defense available to the debtor, and is under no duty to attempt it. *East Tenn. R. R. Co.* v. *Kennedy*, 755.

See EXECUTIONS, 6

FORGERY.

See BANKS AND BANKING.

FRANCHISES.

See CORPORATIONS, 1–4.

FRAUDULDNT CONVEYANCES.

1. WHEN CONVEYANCE IS MADE WITHOUT CONSIDERATION, upon a secret trust, or upon some reservation in favor of the grantor, or to some person without interest therein, the knowledge and intent of the grantee are immaterial, and the conveyance may be set aside. *Lyons* v. *Leahy*, 132.

2. INNOCENT GRANTEE FOR VALUABLE CONSIDERATION will be protected because his equity is greater and superior to that of the general creditors under the statute. *Id.*

3. GRANTEE'S NOTICE OF GRANTOR'S INTENT TO DEFRAUD CREDITORS must be actual, but it may be proved by direct evidence or inferred from circumstances, and established by proof of the grantee's knowledge of facts pointing to the fraudulent intent, or calculated to awaken suspicion and put a prudent man upon inquiry. *Id.*

4. WHERE INSOLVENT GRANTOR conveyed his property to his partner, who conveyed to the grantor's brother without consideration, but with knowledge of the facts in each case, and the second grantee borrowed a sum of money on the property equal to about one fourth its value, which he gave to the first grantor for the purpose of paying certain creditors, the transactions were held fraudulent and void as to creditors, and the facts sufficient to show that the second grantee had notice of the intended fraud, and was not a *bona fide* purchaser within the meaning of the statute. *Id.*

5. DEED FRAUDULENT IN FACT AS TO CREDITORS cannot stand as security for money advanced on it by grantees who have notice of the fraud. *Id.*

6. WHEN, PENDING SUIT FOR DAMAGES for the malicious shooting and wounding of plaintiff by defendant, the latter conveys his property to a party of no means, and with full knowledge of all the facts and circumstances, for a grossly inadequate sum, the conveyance will be held void, and the grantee will be held to have accepted the deed with previous notice of the fraudulent intent of his grantor. *Philbrick* v. *O'Connor*, 139.

7. DEED CONSTRUCTIVELY FRAUDULENT as to creditors may be allowed to stand as security for the purpose of reimbursing an ignorant purchaser for the money advanced. *Id.*

8. WHERE GRANTOR CONVEYS PROPERTY OF GREAT VALUE for a meager consideration, under an agreement that a reconveyance will be made within a certain time for the same consideration, the deed and agreement create a secret trust in favor of the grantor, and are fraudulent and void as against his wife in her suit for divorce and alimony, when the grantee had notice at the time the deed was made of the facts constituting the ground for divorce. He cannot claim to be a *bona fide* purchaser for value. *Weber* v. *Rothchild*, 162.

9. WHERE DEED IS ATTACKED FOR FRAUD, the grantee, in order to prove himself a *bona fide* purchaser, must show that he paid a valuable consideration; that at the time of payment he had no notice of an outstanding equity, or of the fraudulent intent of the grantor, and that he acted in good faith. The same elements which were necessary to constitute a good plea in bar to such cases under the former equity practice are necessary to make a good answer under the Oregon code. *Id.*

10. WHEN DEED IS ATTACKED FOR FRAUD, and the grantee pleads that he is a *bona fide* purchaser for value, such plea is an affirmative defense, casting the burden of proof on him, and the plaintiff need only show the fraudulent intent and purpose of the grantor. *Id.*

11. IF DEBTOR BUYS LAND, PAYING FOR IT with his own means, and with the intent of fraudulently placing it beyond the reach of his creditors takes the title in the name of another person, the land becomes subject to the debts of the fraudulent grantee, and the right of his creditors to have it sold in payment of his debts cannot be defeated by a subsequent voluntary reconveyance to his fraudulent grantor. *Keel* v. *Larkin*, 702.

12. CONVEYANCE BY FRAUDULENT DEBTOR TO HIS WIFE, IN CONSIDERATION OF RELINQUISHMENT OF DOWER. — Where a debtor buys land, and with intent to defraud his creditors takes title in the name of another, and afterwards procures a reconveyance from his fraudulent grantee, and then conveys a portion of the land to his wife, in consideration of her release of dower right in other lands, the conveyance to the wife will be sustained against judgment creditors, either of the debtor or his original fraudulent grantee, it appearing that the wife had no knowledge of her husband's indebtedness, or notice of the fraud under which he acquired title to the land. *Id.*

See EXECUTIONS, 6.

GARNISHMENT.

See ATTACHMENT AND GARNISHMENT.

GUARANTY.

1. DISTINCTION BETWEEN GUARANTY OF PAYMENT AND GUARANTY OF COLLECTION is, that the former is an absolute unconditional undertaking on the part of the guarantor that the maker will pay the note, while the latter is an undertaking to pay if payment cannot, by reasonable diligence, be obtained from the principal debtor. *Cowles* v. *Peck*, 44.

2. GUARANTY OF NOTE IN THESE WORDS: "I guarantee the within note good till paid,"— is conditional, meaning that the note is capable of being collected by the use of ordinary diligence. *Id.*

3. IT IS ESSENTIAL TO VALID CONTRACT OF GUARANTY OF NOTE that there be a sufficient legal consideration therefor. *Id.*

GUARDIAN AND WARD.

1. WARD, AFTER ATTAINING HIS MAJORITY, CAN MAINTAIN SUIT AGAINST SURETIES on the bond of his guardian without making him a party, and before his liability has been ascertained by a final settlement of his accounts. And this rule is not changed by the enactment of a law making provision for forcing an administrator to make final settlement. *State* v. *Slevin*, 526.

2. RIGHT OF WARD TO SUE ON BOND OF HIS GUARDIAN is not affected by statute which provides that if the guardian fails to pay to his ward money ordered on final settlement to be paid to him, summary proceedings may be taken against him to compel such payment. The remedy thus provided is cumulative, but not exclusive. *Id.*

3. WHERE GUARDIAN IS NON-RESIDENT OF STATE, SUIT MAY BE BROUGHT AGAINST SURETIES on his bond without making him a party. *Id.*

4. WHETHER GUARDIAN HAS BEEN RECKLESS AND INJUDICIOUS IN LOANING the money of his ward, and in taking security for it, is a question of fact to be determined by the evidence, under proper instructions. *Id.*

5. GUARDIAN AND HIS SURETIES ARE NOT RESPONSIBLE FOR LOSS OCCASIONED BY LOAN of his ward's money, where he acted in good faith and with ordinary care and prudence in making the loan, and he fully believed that the security accepted by him was amply sufficient to secure the same. *Id.*

6. IF LAND ACCEPTED BY GUARDIAN AS SECURITY FOR LOAN OF HIS WARD'S MONEY WAS SUFFICIENT to properly secure the same at the time it was taken, the guardian and his sureties will not be responsible for any loss that may be occasioned by a subsequent depreciation in the value of the land. *Id.*

7. GUARDIAN WILL NOT BE ALLOWED FOR SUPPORT OF HIS WARD when, at the time he took him into his family and furnished the support, he had no intention of charging therefor. *Id.*

HABEAS CORPUS.

CONSTITUTIONALITY OF ACT UNDER WHICH PARTY HAS BEEN CONVICTED may be inquired into on *habeas corpus*. *Ex parte Rosenblatt*, 901.

HIGHWAYS.

See MUNICIPAL CORPORATIONS.

HOMESTEADS.

1. UNDER COLORADO STATUTE, the wife has the character of a head of a family, while occupying with her husband her property as a home, so as to enable her to designate and affect it with the character of a homestead, so as to exempt it from seizure and sale for the joint debt of herself and husband. *McPhee* v. *O'Rourke*, 579.

2. UNDER COLORADO STATUTE, the wife while occupying with her husband her property as a home may designate and affect it with the character of a homestead, so as to exempt it from seizure and sale, even when such designation is made for the purpose of preventing the joint creditor of the husband and wife from collecting his debt due him for material used in improvements upon the property before it was so designated as a homestead. *Id.*

3. WHEN CONVEYANCE TO WIFE is made by the husband for the purpose of placing the home beyond the reach of his creditors, the wife is not precluded from claiming the benefit of the homestead statute, even as against such creditors. *Id.*

See CO-TENANCY, 1.

HUSBAND AND WIFE.

1. UNDER ANTENUPTIAL CONTRACT BETWEEN WIDOW AND INTENDED SECOND HUSBAND, stipulating that upon the vesting in her of a contingent remainder in certain property, which is dependent on the death of an only grandchild, "the same shall inure and belong to him [the husband], and thereafter they shall own the estate jointly and equally," an equitable interest in such remainder is acquired by the husband, the wife being seised of the legal title for his use, and this interest will descend to his heir at law upon his death after the remainder has become vested. *Wilson* v. *Holt*, 768.

2. CONTENTS OF ANTENUPTIAL CONTRACT executed twenty years prior to the commencement of the action, and alleged to have been destroyed by the wife after the husband's death, was held to be established by testimony of the attorney who wrote the contract, and who states special circumstances calculated to impress the fact on his memory, corroborated by proof of execution by the subscribing witnesses, and subsequent declarations of the wife as to the interests of her husband in the property, in strict harmony with the other facts proved. *Id.*

See CURTESY; MARRIED WOMEN

INFANCY.

WHETHER INFANT OF TENDER YEARS IS CHARGEABLE WITH NOTICE of a fact alleged in a bill to which he is made party, and which his guardian *ad litem* denies, may be questioned; but if a cross-bill is filed in the suit, to which he is not made a party, and which is afterwards dismissed without prejudice and without litigation on its merits, he is not chargeable with facts alleged in it. *Wilson* v. *Holt*, 768.

See PARENT AND CHILD.

INJUNCTIONS.

WHERE GRANTOR HAS GIVEN GRANTEE the sole an exclusive privilege to hunt and take wild fowl upon the waters on grantor's lands, but the grantee has transcended his rights by issuing permits for such privilege to numerous persons who have acted in an insolent and impudent manner toward the grantor, roamed over his land at will to the injury of his crops, left gates open, and shot and wounded his domestic animals, he will not be enjoined from resisting such unwarranted abuse of the privilege granted. *Bingham* v. *Salene*, 152.

See NUISANCES, 1.

INSTRUCTIONS.

See JURY AND JURORS.

INSURANCE.

1. INSURER NOT ENTITLED TO ASSIGNMENT OF MORTGAGE, WHEN. — An owner of lands, who held a policy of insurance on the buildings thereon, verbally agreed to sell the property to her two sons. One half of the consideration was to be paid in cash, or its equivalent, the balance to be secured by a mortgage on the property; and it was further stipulated that, upon the execution of the conveyance, the vendees should have an assignment of the policy to them as owners, and reassign it to her as collateral security upon her mortgage. The deed was given by the vendor, and the mortgage was also signed and acknowledged by the vendees, and by the wife of one of them, but the wife of the other not being present, the mortgage was left in the vendor's custody until the absent wife could be brought to sign it, when the balance of the purchase-money was to be adjusted, and the arrangement as to insurance completed. Before the parties again met, the buildings were burned. *Held*, that upon payment of the amount of the policy, the insurance company was not entitled by subrogation to an assignment of the mortgage. *Nelson* v. *Bound Brook Mut. Fire Ins. Co.*, 809.

2. INSTRUCTION THAT IF CERTIFICATE OF DEATH OF INSURED, made by the attending physician and furnished the company, contained a statement that the insured died of Bright's disease, such statement might be considered as tending to show that he was afflicted with that ailment when he signed the application for insurance, is properly refused, in an action on the policy, issued shortly before the death of the insured, although the inference to be drawn from the statement is a proper subject of argument for the jury. *Continental Life Ins. Co.* v. *Yung*, 630.

3. INSTRUCTION THAT IF INSURED HAD AT TIME OF MAKING APPLICATION some affection or ailment of any organ inquired about in the application, of a character so well defined as to materially derange for a time the functions of the organ, such ailment, whether known to the insured or not, would avoid the policy, and that this would be so of Bright's disease, if it was such a disease as that mentioned, is correct, in an action on the policy. *Id.*

JUDGMENTS.

1. JUDGMENT CANNOT BE COLLATERALLY IMPEACHED BY PARTY on the ground that it is erroneous merely. *Indiana B. & W. R'y Co.* v. *Allen*, 650.

2. VOID JUDGMENT MAY BE ATTACKED in a collateral suit or proceeding. *Chicago & A. R'y Co.* v. *Summers*, 615.

3. JUDGMENT RENDERED BY JUSTICE IN FAVOR OF PARTY FOR WHOM HE IS ACTING AS ATTORNEY in the case, is absolutely void, and may be attacked and impeached whenever and however it is sought to be enforced. *Id.*

4. JUDGMENT BY DEFAULT — WRITTEN INSTRUMENT SUFFICIENT TO SUPPORT. — A promissory note which obligates the maker to pay a specified sum as principal, with interest, "and ten per cent attorneys' fees," is construed to mean ten per cent on the amount of the note as attorneys' fees in any suit brought to enforce its collection, and such a demand will support a judgment by default for the entire amount due, including the attorneys' fees: Ala. Code 1886, sec. 2740. *Wood* v. *Winship M. Co.*, 754.

5. JUDGMENT BY DEFAULT, AFTER SERVICE OF SUMMONS and complaint, and failure to answer, admits the truth of every material allegation in the complaint. *Philbrick* v. *O'Connor*, 139.

6. ENTRY OF DEFAULT AND JUDGMENT before the time specified in the summons for its return, and in the absence of defendant and his counsel, is beyond the jurisdiction of the court, and void. In such case, the cause remains for trial as though there was no pretended default or trial or judgment. *Yentzer* v. *Thayer*, 563.

7. WHERE JUSTICE'S TRANSCRIPT OF EVIDENCE fails to show that either plaintiff or defendant appeared at the time specified for the return of the summons, or any reason for their absence, or that the case was continued, it will be presumed that the parties did not appear, and that the cause was totally continued. *Id.*

8. WHERE RECORD FAILS TO SHOW THAT JUDGMENT BY DEFAULT was not properly entered, the regularity of the proceedings will be presumed, and it will also be presumed that any notice required was given. *Evans* v. *Young*, 583.

9. ONE AGAINST WHOM JUDGMENT BY DEFAULT HAS BEEN TAKEN, WITHOUT SERVICE OF PROCESS, and over whose person the court had acquired no jurisdiction, is entitled to have the judgment set aside, whether he has a good defense to the action or not, and may maintain a direct action for that purpose. *Dobbins* v. *McNamara*, 626.

10 DIRECT ACTION TO VACATE AND SET ASIDE JUDGMENT TAKEN BY DEFAULT, in a case where there had been no service of process upon the defendant therein, and no jurisdiction acquired by the court over his person, is not governed by the statutory requirements concerning complaints for review and applications to set aside defaults, but contemplates the formation of issues, and a hearing upon such evidence as may be mutually introduced. *Id.*

11. IN ACTION ON JUDGMENT, IT IS NO DEFENSE that the defendant had no actual notice of the pendency of the suit in which the judgment was rendered. *Hurlbut* v. *Thomas*, 43.

12. JUDGMENT RENDERED IN ACCORDANCE WITH REQUIREMENTS OF LAW MUST STAND as a valid judgment, and is conclusive upon the parties, until set aside by some direct proceeding for the purpose. *Id.*

13. DIRECT PROCEEDINGS FOR SETTING ASIDE JUDGMENT ARE, a petition for a new trial under the statute (Conn. Gen. Stat. 1875, p. 447, sec. 1), a writ of error *coram nobis*, or, after the three years within which these proceedings must be brought, a suit in equity for relief against the judgment. The last-named remedy will not avail a party who has slept too long upon his rights. *Id.*

14. JUDGMENT OBTAINED IN NEW YORK, IN ABSENCE OF ANY ONE REPRESENTING ASSETS, cannot bind their administration in New Jersey, whatever force such judgment might have with respect to assets which may be found in New York. *Reynolds* v. *Stockton*, 305.

15. DECREE WHICH IS ENTIRELY ASIDE OF ISSUE RAISED IN RECORD IS INVALID, and will be treated as a nullity, even in a collateral proceeding. *Id.*

16. DECREE OR JUDGMENT WHICH IS NOT APPROPRIATE TO ANY PART OF MATTER IN CONTROVERSY before the court can have no force. The matter in controversy is that exclusively which is presented by the pleadings and the issue framed thereby. *Id.*

17. DECREE IN NEW YORK WHICH ADJUDICATES MATTER NOT PRESENTED BY PLEADINGS nor within the issue can have no higher effect than a judgment rendered in the New Jersey courts under like conditions, and it must be treated as a nullity. *Id.*

18. JUDGMENT CREDITOR WILL NOT BE FORCED TO ELECT BETWEEN ACTION AT LAW and a suit in equity, where, having separate judgments against his debtor and his debtor's surety, he proceeds at law to subject land as the property of the principal, and at the same time, by a bill in equity, proceeds to subject the same land as the property of the surety. Though the plaintiff in such case can have but one satisfaction of his claim, he should not be required to elect in which court he will proceed. *Keel* v. *Larkin*, 702.

19. JUDGMENT AGAINST DEFENDANT IN ACTION ON PROMISSORY NOTES IS CONCLUSIVE AGAINST HIM IN SUBSEQUENT ACTION by the plaintiff therein on other promissory notes, where the defense in both actions was that the defendant had executed and delivered to the plaintiff a deed, which was accepted by the plaintiff in full payment of all the notes, and where the verdict in the first action established the fact that the deed was never delivered and accepted as alleged. *Young* v. *Brehe*, 892.

20. OPERATION OF JUDGMENT AS ESTOPPEL IS NOT AFFECTED by the fact that a motion for a new trial is pending in the action in which it is given. *Id.*

21. DECREE WILL NOT BE REVERSED FOR AN ERROR IN IT, which works no injury to the losing party. *Schuh* v. *Sweeny*, 888.

22. EVERY MATERIAL FACT NOT FOUND BY COURT BELOW MUST BE PRESUMED in favor of the judgment. *Jones* v. *Adams*, 788.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; EXECUTIONS; MARRIAGE AND DIVORCE.

JUDICIAL SALES.

See EXECUTIONS.

JURISDICTION.

1. IT IS FUNDAMENTAL MAXIM OF INTERNATIONAL JURISPRUDENCE that every state or nation possesses an exclusive sovereignty and jurisdiction within its own territory; and a consequence of the maxim is, that the laws of every state affect and bind directly all property, real or personal, within its territory. Another consequence of the maxim is, that no state can by its laws, and no court can by its judgments or decrees, directly bind or affect property beyond the limits of that state. *Wimer* v. *Wimer*, 126.

2. COURTS OF EACH STATE HAVE EXCLUSIVE JURISDICTION to settle the title to lands within the limits of the state. *Farmers' Loan and Trust Co.* v. *Postal Tel. Co.*, 53.

3. DEBTS HAVE NO LOCAL SITUS, AND ARE SUABLE in any country or locality where the debtor's person may be found. *East Tennessee R. R. Co.* v. *Kennedy*, 755.

4. VIRGINIA COURTS HAVE NO JURISDICTION TO DECREE PARTITION OR LANDS IN ANOTHER STATE, because the right to transfer, partition, and change real estate belongs exclusively to the state within whose territory it is situated. *Wimer* v. *Wimer*, 126.

5. SEQUESTRATION — STATE COURT CANNOT ENJOIN DECREE OF FEDERAL COURT. — In 1859, Preston was indebted to Dorr, and secured the debt by trust deed to Gibboney. This debt Rohr sought to attach when he instituted this suit in July, 1861. In 1862 the Confederate States court sequestrated this debt, on the ground that it was due to an alien enemy, to wit, Dorr, a citizen of New York. On suggestion that this debt had been attached in the Rohr suit, the confederate court directed Gibboney to pay the money to the receiver, to be loaned out, and it was accordingly paid to the receiver, who loaned it to Rohr. Subsequently, by a decree of the court below, Rohr was adjudged to be entitled to the money as a credit on the alleged indebtedness of Dorr to him. In May, 1878, Dorr obtained a decree in the United States circuit court against the estate of Gibboney, for the full amount of the Preston debt. In the progress of the cause, the executrix of Gibboney asked and obtained leave to file a cross-bill, alleging that her testator, in his lifetime, had in effect paid the Preston debt, as garnishee, into the state court, though in fact he had paid it to the receiver of the Confederate States, under an order of the confederate court; and the prayer of the cross-bill was granted, namely, that the appellant, as Dorr's administrator, be "perpetually enjoined from proceeding to collect the principal and interest decreed by the circuit court of the United States." *Held*, that this was erroneous: 1. The court below acquired no jurisdiction, either of the person or property of Dorr, and the case, as against Dorr's estate, is as

if no process of garnishment had been issued at all; 2. The order of the Confederate States court would afford no protection to the trustee of Gibboney, in a suit against him by the rightful owner of the fund sequestrated; 3. Moreover, a judgment or decree of a federal court cannot be enjoined by a state court, or *vice versa*. *Dorr* v. *Rohr*, 106.

6. JURISDICTION OF COURT IS NOT EXHAUSTED until its judgment is satisfied. *Id.*

7. NOTICE, AND OPPORTUNITY TO BE HEARD, ARE ESSENTIAL REQUISITES TO JURISDICTION of all courts, even in proceedings *in rem*, and judgment without jurisdiction is a nullity. *Id.*

8. ORDER OF PUBLICATION MADE IN VIRGINIA, DURING WAR BETWEEN CONFEDERATE STATES and United States, upon a resident of the state of New York, could not constitute notice, either actual or constructive, and would be without any legal effect. And without legal notice given to the non-resident defendant, the court could not acquire jurisdiction of the fund attached by service of process on the garnishee with the attachment order indorsed thereon. *Id.*

9. JURISDICTION OF NON-RESIDENTS IS MATTER OF STATUTORY CREATION and regulation, and under the provisions of the Alabama statutes there is no jurisdiction in equity to enforce the specific performance of a contract for personal services made with a foreign corporation, or to prevent its breach by process of injunction against resident defendants, the bill failing to aver with sufficient certainty that the contract was made in Alabama, or was to be performed within its jurisdiction. *Iron Age P. Co.* v. *Western Union Tel. Co.*, 758.

10. WANT OF JURISDICTION OF FOREIGN CORPORATION, an indispensable party defendant, may properly be taken advantage of by demurrer, or motion to dismiss, when the defect of jurisdiction appears on the face of the bill, and the question is raised by a co-defendant, but a plea to the jurisdiction would be proper for the foreign corporation itself. *Id.*

See ATTACHMENT AND GARNISHMENT; EQUITY; JUDGMENTS; STATUTE OF LIMITATIONS, 6.

JURY AND JURORS.

1. JURY HAVE A RIGHT TO DRAW FROM PROVEN CIRCUMSTANCES SUCH CONCLUSIONS as are natural and reasonable. *Spies* v. *People*, 320.

2. COURT MAY WITHDRAW FROM JURY HYPOTHETICAL QUESTION which, on account of its scientific nature, they report their inability to answer. *Continental L. I. Co.* v. *Yung*, 630.

3. FORM OF SPECIAL VERDICT is largely matter of discretion on part of court, and refusal to strike out parts thereof, on the ground that they embrace nothing more than conclusions of law, is not available as error on appeal. *Louisville N. A. & C. R'y Co.* v. *Flanagan*, 674.

See CRIMINAL LAW; INSURANCE; NEW TRIAL; WITNESSES, 3.

LANDLORD AND TENANT.

See CO-TENANCY, 2; LIENS, 6, 7.

LARCENY.

See CRIMINAL LAW.

LAW.

See DEFINITIONS, 6.

LICENSE.

See EASEMENTS.

LIENS.

1. COMMON LAW, IN ABSENCE OF STATUTORY REGULATION, ESTABLISHES liens in the order of priority of their acquisition, the first in order of time standing first in order of rank. *Voorhis* v. *Westervelt*, 315.

2. LIEN OF MECHANICS AND MATERIAL-MEN UPON BUILDING OR IMPROVEMENT, in the construction of which labor or material is used, is purely a creature of the statutes, and such statutes, being remedial, must be liberally construed. *White Lake Lumber Co.* v. *Russell*, 262.

3. DESCRIPTION OF PROPERTY SOUGHT TO BE AFFECTED BY MECHANIC'S LIEN IS SUFFICIENT, under Nebraska Compiled Statutes, chapter 54, section 3, where the affidavit describes the improvement as situated on the southwest corner of lots 4, 5, and 6, in a block specified in a city or village, and gives the name of the owner of the property. *Id.*

4. FACT THAT AFFIDAVIT FOR MECHANIC'S LIEN DESCRIBED MORE LAND than would be subject to the lien will not affect the legality of the proceeding, if not done fraudulently. *Id.*

5. MECHANIC'S LIEN — OWNERSHIP OF THE PROPERTY. — The affidavit alleged that the material was sold to H. E. B. for C. E. B., who owned the property. It was shown upon the trial, to the satisfaction of the court, that the material was furnished for the express purpose of making an improvement upon the property of C. E. B. *Held*, that these facts sufficiently sustained the finding of the court that the material was sold upon a contract to be used in the improvement named. *Id.*

6. WHEN LESSOR, BEING THE OWNER OF ENTIRE ESTATE, subject only to a lease, buys the leasehold, and thereby becomes vested with the entire estate, he does not thereby remove the encumbrance of a mechanic's lien created upon the leasehold estate during the tenancy, but the entire estate remains liable for the lien. *Evans* v. *Young*, 583.

7. WHERE OWNER OF ESTATE UNITES the leasehold with the fee, and at the time of purchasing the leasehold has full knowledge of the existence of a mechanic's lien against it, no equitable consideration exists for the separation of the two estates, but an absolute merger will be held to take place, making the entire estate liable for the lien. *Id.*

See ATTACHMENT AND GARNISHMENT, 4; ATTORNEYS AT LAW; VENDOR AND VENDEE, 4–7.

MANDAMUS.

1. MANDAMUS WILL LIE TO ENFORCE the constitutional right of a consumer to the use of unappropriated water, or water undisposed of, for the current year, on payment of reasonable transportation charges to the carrier, in the absence of statutory or other law affording relief. *Wheeler* v. *Northern Colorado Irrigation Co.*, 603.

2. ALTERNATIVE MANDAMUS CANNOT BE SO AMENDED as to allow the substitution in the same action of a new and wholly different cause of action. *Id.*

3. ALTERNATIVE WRIT OF MANDAMUS must state a cause of action, and failing to do so, it will not support a judgment. Its legal sufficiency may, by return or answer, be challenged as upon demurrer, and tested under rules of pleading applicable to complaints when assailed by demurrer. *Id.*

MARRIAGE AND DIVORCE.

1. WHERE LEGISLATIVE RATIFICATION OF DECREE OF DIVORCE is essential to its validity, it will be presumed from great lapse of time (here twenty-two years), taken in connection with proof that the husband married again, and lived with his second wife in the marital relation until his death. *Wilson* v. *Holt*, 768.

2. PARTY AGAINST WHOM DECREE OF DIVORCE IS RENDERED, in state which prohibits the subsequent marriage of a person against whom such a decree is rendered, may nevertheless contract another marriage in a state where such prohibition does not exist, and especially if he is there relieved by legislative act from all the penalties and disabilities imposed by the decree against him. *Id.*

MARRIED WOMEN.

1. AGREEMENT BY MARRIED WOMAN TO HAVE HER MONEY APPLIED to the payment of the debts of her husband or those of any other person, so long as it remains executory, cannot be enforced against her, either at law or in equity; but after the agreement has been completely executed, she cannot abrogate her consent, and reclaim the money. *Warwick* v. *Lawrence*, 299.

2. DISTINCTION BETWEEN EXECUTORY CONTRACT OF MARRIED WOMAN and one that is executed is illustrated in the case of a bond and mortgage given by her to secure the debt of another person; the contract in the bond, being executory, cannot be enforced against her, but the conveyance by the mortgage being executed, her title can be foreclosed in equity. *Id.*

See HUSBAND AND WIFE; VENDOR AND VENDEE, 6

MASTER AND SERVANT.

1. MASTER WHO EMPLOYS SERVANT IN COMPLEX AND DANGEROUS BUSINESS OUGHT TO PRESCRIBE RULES sufficient for its orderly and safe management, and his failure to do so is a personal negligence, for the consequence of which he is liable to his servant. *Reagan* v. *St. Louis etc. R'y Co.*, 542.

2. RAILROAD COMPANY IS LIABLE TO ITS SERVANTS FOR INJURIES RECEIVED IN CONSEQUENCE OF WANT OF REGULATIONS for their guidance in making flying switches, and in the shunting and kicking of its cars. *Id.*

3. EMPLOYER ASSUMES DUTY OF EXERCISING REASONABLE CARE AND PRUDENCE in providing his employee a safe place and tools, in and with which to exercise his employment, and to maintain the place and tools in a reasonably safe condition; and if injury results from the employer's neglect to furnish a safe place and tools, he will be liable therefor, unless the employee, at and before the time he was injured, had full knowledge of the defects in the place or tools in or with which he was required to work. *Little Rock etc. R'y Co.* v. *Leverett*, 230.

4. SERVANT IS NOT BOUND TO SEARCH FOR LATENT DEFECTS IN APPLIANCES of the business in which he is employed, but is only required to take notice of such defects and hazards as are obvious to the senses. He has a right to rely upon the judgment and discretion of his master, and to assume that he will fully perform his duty toward him. *Id.*

5. EMPLOYEE IS NOT BOUND BY RULE OF RAILWAY COMPANY NOT BROUGHT TO HIS ATTENTION, or which is habitually violated with the knowledge

of his superior officers, and without any effort on their part to enforce it, or where the usage and practice of the company would tend to mislead him in the violation of the rule. *Id.*

6. RAILROAD EMPLOYEE CANNOT RECOVER FOR INJURY CAUSED BY DEFECTS COMMON TO RAILROADS, and such as could not have been avoided by the exercise of reasonable care and attention on the part of the company. *Id.*

7. RAILWAY COMPANY DOES NOT WARRANT TO ITS SERVANTS SAFE CONDITION of its line and machinery; it guarantees only that due care shall be used in constructing, keeping in repair, and operating its line, appliances, and machinery. *Little Rock etc. R'y Co.* v. *Eubanks*, 245.

8. MASTER IS NOT LIABLE, AS GENERAL RULE, TO ONE SERVANT for an injury resulting from the negligence of a fellow-servant. Exceptions to the rule are as follows: 1. Where the injury results from exposing the servant to risks not arising out of his contract of service or employment; 2. Where the negligent servant, whatever his grade or title, exercises supervision or control over the injured servant, they are not fellow-servants in a common employment, and the principal must answer for the negligent acts of the former, whereby the latter was injured without fault on his part; 3. Where the principal undertakes to run dangerous machinery with insufficient help, and the servant is thereby injured. *Jones* v. *Old Dominion Cotton Mills*, 92.

9. LIABILITY OF THIRD PERSON TO PERSON INJURED, FOR NEGLIGENCE OF ANOTHER, PROCEEDS upon the maxim, *Qui facit per alium, facit per se*, and presupposes the existence of the relation of master and servant between such third person and the person actually guilty of the negligent act. *Muse* v. *Stern*, 77.

10. MASTER AND SERVANT, WHEN RELATION DOES NOT EXIST. — One Straus, who was the partner in business of the defendant, Stern, individually owned a horse and phaeton. He sent them, in charge of his own servant, to meet the defendant and convey him from the depot to the store of the firm. While going in the direction of the store with the defendant, the servant recklessly drove against the plaintiff, Muse, and knocked him down and injured him. In an action for damages for the injury sustained, *held*, — 1. That the relation of master and servant did not exist between the defendant and the driver at the time of the injury, and the plaintiff could not recover; 2. That the negligence which caused the injury could not be considered as that of the defendant, merely because he was present at the time. *Id.*

11. EVIDENCE THAT MAN WAS ON RAILROAD TRAIN ACTING AS BRAKEMAN between two stations on the road is sufficient to justify the conclusion that he was a regular employee of the company. *St. Louis, I. M., & S. R'y* v. *Hendricks*, 220.

12. WHETHER PARTICULAR ACT OF SERVANT WAS OR WAS NOT DONE IN LINE OF HIS DUTY is a question to be determined by the jury from the surrounding facts and circumstances. *Id.*

13. CONTRACT BY WHICH EMPLOYEE ENGAGED IN OPERATING DANGEROUS MACHINERY AGREES IN ADVANCE TO WAIVE the duties and liabilities which the employer owes him to furnish a reasonably safe place in which, and suitable tools and appliances with which, to do his work, is against public policy, and void. *Little Rock and Fort Smith R'y Co.* v. *Eubanks*, 245.

See NEGLIGENCE; RAILROADS.

MATERIAL-MEN'S LIENS.

See LIENS.

MECHANICS' LIENS.

See LIENS.

MORTGAGES.

1. INDORSEMENT OF NOTE SECURED BY MORTGAGE OPERATES as an equitable assignment of the mortgage. *Connecticut M. L. I. Co.* v. *Talbot*, 655.

2. ASSIGNEE OF MORTGAGE WHO FAILS TO RECORD HIS ASSIGNMENT will be estopped from asserting the priority of his mortgage over that of a subsequent mortgagee who took upon the faith of a release executed by the administratrix of the original mortgagee and entered of record. *Id.*

3. UNREGISTERED MORTGAGE EXECUTED BY ANCESTOR RETAINS ITS PRIORITY over a judgment recovered against his heir at law in the ancestor's lifetime, although the judgment creditor had no notice of the mortgage when his judgment was recovered. *Voorhis* v. *Westervelt*, 315.

4. REGISTRY LAW APPLIES ONLY IN CASES WHERE INTEREST OF SUBSEQUENT judgment creditor, mortgagee, or purchaser, at the time he acts, can be affected by want of notice of the unregistered mortgage. It was not intended to relate to those who have no concern in such mortgage when they acquire their rights. *Id.*

5. UNRECORDED MORTGAGE GIVEN BY ANCESTOR IS DISPLACED by a judgment recovered against the heir at law after the ancestor's death; and a purchaser of the heir's estate at a sale under such judgment, if he has no notice of the mortgage, is a *bona fide* purchaser, and will take free from the lien of such mortgage. *Id.*

6. CHATTEL MORTGAGE, LIKE ANY OTHER CONTRACT, IS TO BE CONSTRUED TOGETHER, the object being to ascertain with precision the mutual understanding of the parties. The whole instrument is to be viewed and compared in all its parts, so that every part of it may be made consistent and effectual. *Newlean* v. *Olson*, 286.

7. MORTGAGEE OF CHATTELS IS NOT AUTHORIZED, WITHOUT CAUSE, TO SEIZE AND SELL the mortgaged property before the debt becomes due, under a provision in the mortgage that he may seize and sell the property, if he shall at any time feel "unsafe or insecure," and the mortgage also provides for interest in favor of the mortgagee, and that the debt is to be paid at certain times named, and thereby there is an implied agreement that the mortgagor shall remain in possession until a default in payment of the whole or a part. *Id.*

8. CLAUSE IN CHATTEL MORTGAGE AUTHORIZING MORTGAGEE TO SELL if at any time he feels "unsafe or insecure" does not mean that he may, arbitrarily and without cause, declare that he feels unsafe or insecure, but the mortgagor must be about to commit or has committed some act which tends to impair the security. *Id.*

9. PROCEEDINGS TO FORECLOSE MORTGAGE IN COURTS OF STATE OF NEW YORK upon lands in Connecticut are without validity, and do not affect the right to a foreclosure of the mortgage according to the laws of the latter state. *Farmers' Loan and Trust Co.* v. *Postal Tel. Co.*, 53.

See ADVERSE POSSESSION, 1, 2; INSURANCE; STATUTE OF LIMITATIONS, 5.

MUNICIPAL CORPORATIONS.

MUNICIPAL AUTHORITIES OF CITY must exercise ordinary care in keeping the sidewalk free from defects and obstructions, and a failure to perform this duty may lay the foundation of municipal liability. *City of Denver* v. *Dean*, 594.

WHERE CITY DID NOT CONSTRUCT SIDEWALK, a defect in which caused an accident not occasioned by any act of the city, its officers or agents, before a recovery can be had it must be proved that the corporation had notice of the defect, and also that it was in possession of such notice a sufficient length of time before the accident to have cured the defect and prevented the injury. Such notice might be actual or constructive. *Id.*

ERSONAL KNOWLEDGE OF OFFICER OF CITY gained in pursuance of his duties of defects in or obstructions to the sidewalks in such city is actual, but not constructive, notice to the city. *Id.*

UNICIPAL CORPORATION MAY BE CHARGED WITH CONSTRUCTIVE NOTICE of defects in its sidewalks so as to be held liable for injury caused thereby, either where an exercise of ordinary care on its part or the part of its officer involves the anticipation of defects that are the natural and legitimate result of use or climatic influences, or where the corporation had the means of knowledge for a sufficient time to have remedied the defect. The phrase "means of knowledge" includes cases of neglect to anticipate and prevent certain defects mentioned above. *Id.*

ACTION AGAINST CITY FOR INJURY resulting from defective sidewalk, it is within the province of the jury to determine whether or not the city or its proper officer had personal knowledge of the defect for a sufficient length of time previous to the injury to make the city liable. *Id.*

See COUNTIES.

MURDER.

See CRIMINAL LAW.

NAMES.

See EVIDENCE, 6.

NEGLIGENCE.

DEFENDANT HAS NO ABSOLUTE RIGHT TO HAVE PERSONAL PHYSICAL EXAMINATION OF PLAINTIFF MADE, in an action for personal injuries. The granting or refusing of an order for such an examination rests in the discretion of the trial court, which discretion will not be interfered with unless manifestly abused. *Sidekum* v. *Wabash etc. R'y Co.*, 549.

WHERE COURT MERELY DENIES MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF for the time being, at the same time remarking that if, during he progress of the trial, it appeared necessary to ascertain the plaintiff's eal condition, and the nature and extent of her injuries, he would then irect such an examination, and the defendant does not at any subsequent stage of the proceeding renew the application for such order, the court may well assume that the defendant abandoned his application for the order. *Id.*

EVIDENCE OF CONDITION OF RAILROAD TRACK SHOULD BE CONFINED TO PLACE OF ACCIDENT, or to the immediate vicinity thereof, in an action against the company for injuries sustained on its road; and testimony as

to the condition of the track a mile and a half from the place of the accident is incompetent and inadmissible. The reception of such improper evidence will not, however, be ground for reversal, where it was withdrawn, and excluded from the jury, by the subsequent instruction of the court, the competent and admissible evidence in the record being amply sufficient to authorize the verdict, independent of that erroneously received. *Id.*

4. NEGLIGENCE — APPLICATION OF PRINCIPLE OF RESPONDEAT SUPERIOR. — The plaintiff, a boy thirteen years of age, was in the service of the defendant corporation, being engaged in the weaving department of its cotton mills, "to sweep the floor, carry water, and fill the buckets with quills." The dangerous machinery of the weaving department was at the time being operated with insufficient help, and an employee of the defendant, acting as its agent, called on the plaintiff for help, and ordered him into a position of danger, the result of which was irreparable injury to him. *Held*, that the defendant corporation was liable in damages for the injury sustained by the plaintiff. *Jones* v. *Old Dominion Cotton Mills*, 92.

5. ONE WHO WALKS UPON RAILROAD TRACK LAID ALONG PUBLIC STREET IS NOT TRESPASSER, especially if he be at a public crossing, and may recover for an injury caused by the negligence of the railroad company, if himself without fault. *Ohio & M. R'y Co.* v. *Walker*, 638.

6. GENERAL AVERMENT THAT PLAINTIFF WAS WITHOUT FAULT IS SUFFICIENT, in an action for a negligent injury, unless the facts specially pleaded clearly show that he was guilty of contributory negligence. *Id.*

7. NEGLIGENCE MAY BE CHARGED IN GENERAL TERMS; and if the defendant desires a more definite statement of the facts, his remedy is by motion to make the complaint more specific, and not by demurrer. *Id.*

8. DECLARATION IS SUFFICIENT, ALTHOUGH IT DOES NOT STATE whether the plaintiff was an employee or a mere trespasser, if it distinctly sets forth when, where, in what manner, and under what circumstances the plaintiff was injured by the default, negligence, and improper conduct of the defendant's servant, who was then and there in the care and management of certain described machinery of the defendant. *Jones* v. *Old Dominion Cotton Mills*, 92.

9. FOR NEGLIGENCE CAUSING PERSONAL INJURIES TO MINOR CHILD, separate and concurrent actions may, in the absence of statute, be maintained by the child and its father. *Pratt C. & I. Co.* v. *Brawley*, 751.

10. IN ACTION BY CHILD FOR INJURIES CAUSED BY NEGLIGENCE of a third person, the contributory negligence of the child's father is no defense, and cannot be imputed to the child when it is of such tender years as to be legally presumed as incapable of judgment and discretion; but when the child is between the ages of seven and fourteen years, though *prima facie* incapable of judgment and discretion, evidence of capacity may be received, and contributory negligence imputed and shown in defense of the action. *Id.*

11. IN ACTION BY FATHER FOR PERSONAL INJURIES TO CHILD CAUSED BY NEGLIGENCE, the contributory negligence of the child is a good defense, unless the child be within the age which raises the legal presumption of incapacity. *Id.*

12. IN ACTION BY FATHER FOR PERSONAL INJURIES TO CHILD caused by negligence, the contributory negligence of the father is a complete defense, without regard to the age or capacity of the child. *Id.*

13. IN ACTION FOR PERSONAL INJURIES TO CHILD CAUSED by the wanton, reckless, or intentional negligence of defendant, the contributory negligence of neither father nor child is available as a defense. *Id.*

14. FATHER WHO KNOWINGLY PERMITS CHILD ABOUT SEVEN YEARS OF AGE to go unprotected upon the track of a railroad for the purpose of picking up coal at a place where trains are constantly passing is guilty of culpable negligence. *Id.*

15. IF FATHER PERMITS GRANDMOTHER TO HAVE CARE AND CUSTODY OF CHILD, her negligence, whereby the child is injured, is to be imputed to the father. *Id.*

16. CONTRIBUTORY NEGLIGENCE IS MATTER OF DEFENSE, which cannot be presumed, but must be proved, and the burden of proving it rests on the defendant. *Little Rock etc. R'y Co.* v. *Leverett*, 230.

17. CONTRIBUTORY NEGLIGENCE, AS DEFENSE, MUST BE AFFIRMATIVELY PROVED. *Little Rock etc. R'y Co.* v. *Eubanks*, 245.

18. WHETHER THE DEFENDANT WAS IN THIS CASE GUILTY OF NEGLIGENCE in failing to prescribe suitable rules was held to be a question for the jury. *Reagan* v. *St. Louis etc. R'y Co.*, 542.

19. CONTRIBUTORY NEGLIGENCE. — A person is not a trespasser who, by the conductor's permission, is on a freight-car while it is being loaded, nor is his presence there contributory negligence, unless it was known to him that the conductor exceeded his authority in granting such permission. *Alabama G. S. R'y Co.* v. *Yarbrough*, 715.

20. IN ACTION FOR DAMAGES FOR PERSONAL INJURY, LOSS OR DIMINUTION OF CAPACITY to follow the plaintiff's usual business or employment is a proper subject for compensation. The extent and nature of plaintiff's business, and his physical capacity to perform work at the time he was injured, may be shown; and where one of the injuries sustained was the breaking of an arm, it is competent for him to prove that his other arm had been previously disabled, not as an element of recoverable damages, but as showing the decreased capacity produced by the injury complained of. *Id.*

21. STATEMENTS OF DECEASED AS TO CAUSE AND MANNER OF INJURY, MADE BY HIM IMMEDIATELY after being run over by a railroad car, and while he was still under the car, are admissible in evidence as part of the *res gestæ* in an action against the company for negligence resulting in the death of the person injured. *Little Rock etc. R'y Co.* v. *Leverett*, 230.

22. EVIDENCE OF POVERTY OF MOTHER, AND OF HER DEPENDENCE ON HER DECEASED SON for support and maintenance, is admissible in evidence to show the pecuniary damage suffered by her by his death, in an action brought by her under the statute, as next of kin of the deceased. *Id.*

23. IT IS NOT ERROR TO EXCLUDE EVIDENCE OF FINANCIAL CONDITION OF MOTHER in an action brought by her to recover damages for the drowning of her son, when she had already testified as to her circumstances and surroundings at the time the accident happened. *Overholt* v. *Vietha*, 557.

24. EVIDENCE OF IMPRACTICABILITY OF MAKING FENCE IS ADMISSIBLE as bearing upon the question of negligence, in an action for damages for the death of plaintiff's son, based upon the alleged negligence of the defendant in not fencing on a line of his lot which did not abut upon a street or highway, but on the private property of another, especially where it was shown that the defendant had owned the lot but a short length of time. *Id.*

25. OWNER OF LAND IS NOT UNDER OBLIGATION TO STRANGERS TO PUT GUARDS AROUND EXCAVATIONS made by him, unless such excavations are so near

a public highway as to be dangerous, under ordinary circumstances, to persons passing upon the way, and using ordinary care to keep upon the proper path; in which case he must take reasonable precautions to prevent injuries happening therefrom to such persons. *Id.*

See EVIDENCE, 8; MASTER AND SERVANT; OFFICE AND OFFICERS; RAILROADS.

NEGOTIABLE INSTRUMENTS.

1. IT IS VALID ACCEPTANCE OF DRAFT where the drawee wrote across the face thereof the words, "Excepted Sept. 18. L. B. Maben." And parol evidence, not being inconsistent with the writing itself, is admissible to show that the purpose of the drawee in writing the word "excepted" was to "accept" the draft. *Cortelyou* v. *Maben*, 284.
2. ACCEPTOR OF BILL OF EXCHANGE HAS RIGHT TO QUALIFY HIS ACCEPTANCE by designating the place of payment; and when the place of payment is thus designated, it becomes part of the contract of acceptance. *Brown* v. *Jones*, 623.
3. SECTION 368, INDIANA REVISED STATUTES OF 1881, PROVIDING THAT IT SHALL NOT BE NECESSARY TO AVER OR PROVE DEMAND AT PLACE OF PAYMENT fixed by a bill, note, or other contract, has no application to a case where the demand of payment is necessary to create a cause of action against the drawer or indorser of a bill of exchange. *Id.*
4. PRESENTMENT MUST BE MADE AT PLACE OF PAYMENT DESIGNATED by the acceptance of a bill of exchange, or a sufficient excuse for failing to so present it must be shown, or else the drawer and indorsers of the bill will be discharged. *Id.*
5. IT WILL BE PRESUMED BY SUPREME COURT THAT BILL OF EXCHANGE WAS NOT PRESENTED AT PLACE DESIGNATED by the acceptance, where it is not stated in the finding that the bill was so presented. *Id.*
6. LAW OF INDIANA GOVERNS AS TO LIABILITY OF INDORSER where promissory notes are made and indorsed in that state. *Dunnigan* v. *Stevens*, 496.
7. UNDER LAW MERCHANT, INDORSEMENT OF NOTE AMOUNTS TO CONTRACT on the part of the indorser, that if, when duly presented, the note is not paid by the maker, the indorser will, upon due and reasonable notice given him of the dishonor, pay it to the indorsee or other holder. *Id.*
8. INDORSER MAY, BY FORM OF HIS INDORSEMENT, MAKE HIMSELF ABSOLUTELY and positively, in all events, liable for the payment of the note, with or without due presentment or due notice of non-payment. If there be an agreement in writing to dispense with any demand upon the maker, or with notice of dishonor, the language will be construed to import an absolute dispensation, with the ordinary conditions of an indorsement, and the liability of the indorser will become as full as that of a surety or guarantor. *Id.*
9. LAW MERCHANT IN FORCE IN INDIANA APPLIES to a note payable in a bank in that state; and where there is an express waiver in writing by the indorser, of presentment of the note for payment, and of notice of its non-payment, this dispenses with the conditions precedent to the indorser's liability, and makes his obligation for the payment of the note unconditional and absolute. On maturity of the note, the holder may immediately bring suit against the indorser without performance of any act. *Id.*
10. WHERE INDORSER OF PROMISSORY NOTE IS LIABLE ABSOLUTELY for its payment, the indorsee of such note may, under the provisions of the

Illinois Revised Statutes, chapter 3, section 67, relating to the settlement of the estates of deceased persons, and before maturity of the note, have the same allowed against the estate of the indorser. The statute is, that "any creditor whose debt or claim against the estate is not due may present the same for allowance and settlement," and the indorsee of the note in such case is a creditor within the statute. *Id.*

11. WHERE THE INDORSEE OF A NOTE fills the blanks contained therein so as to change the rate of interest from the legal rate to an excessive rate, without the knowledge or consent of the maker, the note is vitiated and becomes void. *Hoopes* v. *Collingwood*, 565.

12. PROOF THAT ASSIGNMENT OF NOTE WAS MADE BEFORE ITS MATURITY will overcome the statutory rule that an assignment without date shall be taken to have been made at a date most to the advantage of the defendant. *Tabor* v. *Merchants' Nat. Bank*, 241.

13. PRODUCTION OF NOTE AND PROOF THAT INDORSEMENT WAS MADE BEFORE MATURITY RAISES PRESUMPTION that the holder paid value for it, was an innocent holder, and acquired it in due course of business; but the presumption of the payment of value is overcome by proof that the note, in its inception, was so infected with fraud as to destroy the title of the original holder, and the burden of proof that value was given for it is then shifted to the plaintiff. *Id.*

14. SURETY WHO SIGNS NEGOTIABLE NOTE WITH AGREEMENT THAT IT IS NOT TO BE DELIVERED to the payee until it is signed by other sureties cannot, as against an innocent payee without notice, set up the fraud of the maker in delivering it without the signatures of the additional sureties. He is regarded as having constituted the maker his agent to negotiate the note, and having clothed him with the means of perpetrating the fraud, he must bear the loss. *Id.*

15. ONE WHO TAKES NEGOTIABLE PAPER IN PAYMENT OF ANTECEDENT DEBT, before maturity, and without notice of any defect therein, receives it in due course of business, and becomes a holder for value, entitled to enforce payment without regard to the defenses that may exist between other parties to the paper. *Id.*

See BANKS AND BANKING; JUDGMENTS, 19; MORTGAGES.

NEW TRIAL.

1. POWER OF COURT TO GRANT NEW TRIAL BECAUSE VERDICT IS CONTRARY TO EVIDENCE should be cautiously exercised, and never, in a doubtful case, merely because the court, if on the jury, would have given a different verdict. *Muse* v. *Stern*, 77.

2. VERDICT OUGHT NOT TO STAND, when there is clear and convincing proof of an essential fact, contrary to the finding of the jury, and no evidence fairly tending to sustain it. *Continental L. I. Co.* v. *Yung*, 630.

3. RULING OF TRIAL COURT REJECTING EVIDENCE WILL BE PRESUMED PROPER where nothing is preserved in the record to show the contrary. *Overholt* v. *Vieths*, 557.

4. SUPREME COURT CANNOT SAY THAT EVIDENCE IS CONCLUSIVELY CONTRADICTED, however much it may be opposed by other testimony, where competent evidence appears in the record which, if believed, necessarily tends to support the finding of the jury, unless it be of such a character that, to believe it, would necessarily involve an absurdity in reason, or an impossibility according to the very nature of things. *Continental L. I. Co.* v. *Yung*, 630.

5. SUPREME COURT IS NOT JUSTIFIED IN ORDERING NEW TRIAL, because the evidence which tends to support the finding of the jury may be contradicted. *Id.*

NOTICE.

THAT PARTIES HAD DUE NOTICE OF JUDICIAL PROCEEDINGS will be presumed after the lapse of twenty years, although the record does not affirmatively show that fact. *Wilson* v. *Holt*, 768.

See CORPORATIONS, 36–38; INFANCY.

NUISANCE.

1. IN ACTION TO ENJOIN CONTINUANCE OF NUISANCE AND FOR DAMAGES, it is an insufficient defense that the business alleged to be a nuisance is *per se* lawful, and the use made by the defendant of his own property is reasonable; nor is it sufficient that the locality is one in which there is a large number of other manufacturing establishments, and the neighborhood is largely occupied by mechanics and tenement-houses; nor that the plaintiff elected to build in the locality on his own land, and reside there after the defendant erected the nuisance. *Hurlbut* v. *McKone*, 17.
2. QUESTION OF REASONABLE USE OF ONE'S PROPERTY is to be determined in view of the rights of others. *Id.*
3. NUISANCE — PROPER ELEMENTS OF DAMAGE — EVIDENCE PRESUMED TO BE USED FOR PROPER PURPOSE. — A suit was brought for an injunction against the continuance of a nuisance, and also for damages. The court, in its findings, went beyond the allegations of the complaint in two particulars, namely, with regard to the intolerable character of the nuisance, and its effect upon the health of the plaintiff and his family. *Held*, that as the suit was for an injunction and also for damages, it would be presumed, in the absence of any evidence to the contrary, that the facts unalleged were applied by the judge to the matter of the injunction, and were not considered by him as ground for additional damages, especially as there was no objection to the facts in the court below. *Id.*

OFFICE AND OFFICERS.

1. OFFICE IS RIGHT TO EXERCISE PUBLIC FUNCTION OR EMPLOYMENT, and to take the fees and emoluments belonging thereto; and from its inherent nature, no less than from reasons of public policy, there cannot be two persons in the possession of the same office at the same time. *Hamlin* v. *Kassafer*, 176.
2. OFFICER DE FACTO IS ONE IN ACTUAL POSSESSION of the office, and in the exercise of its function and discharge of its duties. When this occurs, there can be no other incumbent of the office. *Id.*
3. OFFICER DE JURE IS ONE WHO HAS LAWFUL RIGHT to the office, but who has either been ousted from or never actually taken possession of the office. *Id.*
4. WHEN OFFICER DE JURE IS ALSO OFFICER DE FACTO, the lawful title and possession are united, and no other person can be officer *de facto* to that office. *Id.*
5. OFFICER DE FACTO IS ONE WHO EXERCISES DUTIES OF OFFICE under color of appointment or election. He differs from a mere usurper who undertakes to act without color of right, and also from an officer *de jure*, who is in all respects legally appointed and qualified to exercise the office. *Id.*

6. DISTINCTION BETWEEN OFFICER DE JURE AND DE FACTO is, that the former has the lawful right or title, without the possession of the office, while the latter has the possession and performs the duties under color of right, without being qualified in law to act; and both are distinguished from a mere usurper, who has neither title nor color of right. *Id.*

7. MERE CLAIM TO BE OFFICER DOES NOT CONSTITUTE one an officer *de facto*. There must also be some color or claim of right to the office, or without it, a performance of official duties, with the acquiescence of the public, for such length of time as to raise a presumption of colorable right. *Id.*

8. COLOR OF RIGHT WHICH CONSTITUTES ONE AN OFFICER DE FACTO may consist in an election or appointment, or in holding over after the expiration of one's term, or in acquiescence by the public in the acts of such officer for such length of time as to raise the presumption of colorable right by election or appointment. *Id.*

9. LAW RECOGNIZES OFFICIAL ACTS OF OFFICER DE FACTO as lawful to a certain extent. It will not allow them to be questioned collaterally, and they are valid as to the public, and third persons who have an interest in the thing done. *Id.*

10. ACT OF OFFICER DE JURE, WITHIN SCOPE OF HIS AUTHORITY, are valid for all purposes, but not so with an officer *de facto;* his acts are only recognized to be valid so far as they affect the public and third persons; as to these, his acts are as valid as those of an officer *de jure*. *Id.*

11. MERE USURPER IN OFFICE is one who acts without color of title, and whose acts are utterly void. *Id.*

12. TITLE TO OFFICE CANNOT BE DETERMINED by private suit between individuals; it must be tried by *quo warranto*. *Id.*

13. WHERE OFFICER HOLDS OVER AFTER EXPIRATION OF HIS TERM, under claim or color of right, his official acts are those of a *de facto* officer, and are valid as to the public and third persons, and cannot be collaterally attacked. This rule applies to a judgment obtained before a *de facto* justice of the peace. *Id.*

14. WHEN DE FACTO OFFICER is in possession of the office when adverse claim is made, he may continue to exercise the acts of the office until the title thereto is determined; and his acts, within the scope of his authority, are valid and binding upon the public and third persons, and cannot be collaterally assailed. *Id.*

15. AUTHORITY CONFERRED BY LAW UPON EXECUTIVE TO FILL VACANCIES in office by appointment does not confer upon him the power of ultimately determining whether the vacancies actually exist, and a claimant has the right to have such question determined in the courts. *State ex rel. Carson* v. *Harrison*, 663.

16. VACANCY IN OFFICE. — Under the provision of the Indiana constitution that "officers shall continue in office until their successors are elected and qualified," no vacancy occurs which the governor can fill by appointment, where one holding an appointive office under the general assembly continues to hold it after the expiration of his term, no successor having been appointed by the assembly. *Id.*

17. TENURE OF OFFICE. — The provision of the Indiana constitution that "the general assembly shall not create any office the tenure of which shall be more than four years" does not prevent one who holds an office created by the general assembly, the term of which is four years, from holding over, after the expiration of his term, until his successor be elected and qualified. *Id.*

18. PUBLIC MINISTERIAL OFFICER IS ANSWERABLE IN CIVIL ACTION FOR ANY ACT OF NEGLIGENCE or misconduct, whereby damage proximately results to the party complaining. *Eslava* v. *Jones*, 699.

19. PUBLIC OFFICERS WHO ARE INTRUSTED WITH PUBLIC FUNDS, and required to give bonds for the faithful discharge of their official duties, are not mere bailees of the money, to be exonerated by the exercise of ordinary care and diligence. Their liability is fixed by their bonds; and the fact that money is stolen from them, without any fault or negligence upon their part, does not release them from liability thereon. *State* v. *Nevin*, 873.

20. BOND REQUIRING FAITHFUL PERFORMANCE OF OFFICIAL DUTY IS AS BINDING upon the principal and his sureties as if all the statutory duties of the officer were inserted in it. *Id.*

21. COUNTY TREASURER IS REQUIRED TO SAFELY KEEP PUBLIC MONEY, by the Compiled Laws of Nevada, and pay it out only as provided by law. *Id.*

22. STATE IS NOT COMPELLED TO WAIT UNTIL CLOSE OF COUNTY TREASURER'S TERM OF OFFICE before commencing an action upon his bond, where he admits the defalcation, and claims the right to interpose the defense of a robbery of the funds. *Id.*

23. DEMURRER TO ENTIRE COMPLAINT IN ACTION ON OFFICIAL BOND IS PROPERLY OVERRULED, where, several breaches of the bond being assigned, some of them are sufficiently certain and definite. *Coleman* v. *Pike Co.*, 746.

24. PROOF OF EXECUTION OF BOND WHICH IS FOUNDATION OF SUIT is not required under provision of the Alabama Code, section 3036, unless the execution is denied by a verified plea. *Id.*

See SURETYSHIP.

PARENT AND CHILD.

1. FATHER, IF FIT AND SUITABLE PERSON, IS GENERALLY ENTITLED TO CUSTODY AND CONTROL of his infant child. But the court has a discretion upon the subject, and the welfare of the infant is the pole-star by which the discretion of the court is to be guided. The rights of the child are first to be considered, and are clearly to be protected in the enjoyment of its personal liberty, according to its own choice, if arrived at the age of discretion, and if not, to have its personal safety and interests guarded and secured by the law, acting through the agency of those who are called on to administer it. *Merritt* v. *Swimley*, 115.

2. CUSTODY AND CONTROL OF INFANT CHILD WILL NOT BE RESTORED TO HER FATHER, against her wishes, in a case where the father transferred her custody, before she was a month old, to female relatives, who tenderly nursed and reared her in happy contentment until she was twelve years of age. *Id.*

3. PURCHASE OF LAND BY FATHER IN NAME OF HIS CHILDREN IS PRESUMED TO BE ADVANCEMENT to them by him, and the equitable as well as the legal title vests in them. And the fact that the father takes possession, makes improvements, and receives the rents and profits, is not sufficient to show that an advancement was not intended. *Bogy* v. *Roberts*, 210.

PARTITION.

See JURISDICTION, 4.

PARTNERSHIP.

1. RELATION EXISTING BETWEEN PARTNERS IS ONE OF TRUST and confidence, and when dealing with each other in relation to the partnership matters, they are required to make full disclosure of all material facts within their knowledge in any way relating to the partnership affairs. *Caldwell* v. *Davis*, 599.

2. COMMUNITY OF INTEREST EXISTS BETWEEN PARTNERS, producing a community of duty. *Id.*

3. WHEN CONTRACTING BETWEEN THEMSELVES, PARTNERS ARE REQUIRED to show the utmost good faith toward each other, and the concealment of material facts by one, which he should disclose to the other, is a fraud for which the contract may be canceled. *Id.*

PAYMENT.

See STATUTE OF LIMITATIONS.

PHYSICIANS.

PHYSICIAN CALLED IN GENERALLY, WITHOUT LIMITATION AS TO HIS ATTENDANCE, is impliedly engaged to attend the patient through that illness, or until his services are dispensed with. *Dale* v. *Donaldson Lumber Co.*, 224.

PLEADING AND PRACTICE.

1. MODES OF PROCEDURE AND RULES OF PRACTICE, PRESCRIBED IN CIVIL ACTIONS, ARE ALL APPLICABLE in Indiana to special statutory proceedings for the enforcement of private rights, except where the statute authorizing and regulating such special proceeding has expressly or by fair implication prescribed a different course of procedure or rule of practice therein. *Chicago & A. R'y Co.* v. *Summers*, 615.

2. WHERE ALLEGED MISJOINDER OF PARTIES appears on the face of the complaint, and is demurred to and overruled but an answer is filed and the trial proceeded with, the defendant waives his right to insist on the alleged error in the appellate court. *Fillmore* v. *Wells*, 567.

3. PERSON ENTITLED TO ELECTION BETWEEN INCONSISTENT REMEDIES WILL BE CONFINED TO ONE which he first prefers and adopts. *Nanson* v. *Jacob*, 531.

4. ARGUMENTATIVE PLEADING IS BAD under all systems of practice. *Supply Ditch Co.* v. *Elliott*, 586.

5. WHERE COMPLAINT DESCRIBES LANDS SUED FOR as east half of a certain tract, a deed for the south half of the same tract is properly admissible in evidence, since the one is necessarily overlapped by the other in part. *Green* v. *Jordan*, 711.

6. DEMURRER ADMITS ALL MATERIAL FACTS WELL PLEADED, and all necessary intendments and inferences as to such facts as the demurrer applies, but all facts not alleged in the pleading attacked by demurrer or necessarily inferred are assumed not to exist. *Supply Ditch Co.* v. *Elliott*, 586.

7. MOTION TO STRIKE OUT ANSWER WILL NOT PERFORM OFFICE OF DEMURRER THERETO for want of sufficient facts, and should not be sustained if the facts pleaded therein are relevant or pertinent to the issue, although insufficient on demurrer. *Chicago & A. R'y Co.* v. *Summers*, 615.

8. DEFENDANT, BY PLEADING OVER AFTER DEMURRER OVERRULED, WAIVES ALL OBJECTIONS to the ruling of the court on the demurrer. *Tabor* v. *Merchants' Nat. Bank*, 241.

9. WHERE ANSWER DENIES ASSIGNMENT OF CAUSE OF ACTION TO PLAINTIFF, and that he is the real party in interest, it is error to exclude evidence offered in support of the issue so tendered. *Nanson* v. *Jacob*, 531.

10. WRIT OF ERROR BRINGS UP WHOLE RECORD, and though the judgment below were on a demurrer to evidence, advantage may be taken of a fatal defect in the declaration. *Jones* v. *Old Dominion Cotton Mills*, 92.

11. EVERY PRESUMPTION IS IN FAVOR OF CORRECTNESS AND REGULARITY OF PROCEEDINGS of courts of general jurisdiction, and error cannot be presumed. Bills of exceptions should therefore state affirmatively that they contain "all the evidence" submitted to the trial court. *Aspinwall* v. *Sabin*, 258.

12. USUAL PRACTICE OF APPELLATE COURTS IS TO CONSIDER WHOLE RECORD, and pass upon errors in the order in which they were committed, and generally to reverse the judgment for any material error, not waived, without looking into the subsequent proceedings. *Jones* v. *Old Dominion Cotton Mills*, 92.

13. WHERE RIGHT VERDICT IS SET ASIDE, APPELLATE COURT WILL RESTORE IT and enter judgment thereon, and will reverse a subsequent judgment that is inconsistent with the previous right verdict. But if the subsequent judgment be consistent therewith, it will be affirmed. Yet if the plaintiff was entitled to a judgment on the first verdict set aside on the defendant's motion, he is entitled to a judgment on the last verdict, where both arrived at the same result, the only difference being that the last verdict found a larger amount of damages in the plaintiff's favor. *Id.*

14. PRACTICE — JUDGMENT ON LAST VERDICT. — The plaintiff had two verdicts in succession, in his favor, for damages for an injury sustained through the negligence of the defendant. Each verdict was, in its turn, set aside on the defendant's motion. A third verdict was rendered in favor of the plaintiff, giving a larger amount of damages, subject, however, to the defendant's demurrer to the evidence, which the court below erroneously sustained. *Held*, that the plaintiff was entitled to judgment on the last verdict. *Id.*

15. RULE OF APPELLATE COURT WHERE THERE HAVE BEEN TWO TRIALS of a case in the lower court is, to look only to the proceedings on the first trial, and if it discovers that the trial court erred in setting aside the verdict on that trial, to set aside all proceedings subsequent to such verdict, and enter judgment thereon. *Muse* v. *Stern*, 77.

16. WHERE EVIDENCE IS CONFLICTING, AND INVOLVES CREDIBILITY OF WITNESSES, and the trial court sets aside the verdict and certifies the evidence, the appellate court will look to the whole evidence and sustain the verdict, unless there has been a plain deviation from right and justice, and the verdict is against the law or the evidence, or without evidence. *Id.*

17. COURT CANNOT DICTATE ORDER IN WHICH PARTY SHALL PUT IN HIS EVIDENCE as to a question of fact. *Lewis* v. *Schwenn*, 511.

18. DISCRETION OF TRIAL COURT IN REGULATING CONDUCT OF COUNSEL IN ARGUMENT will not ordinarily, in civil cases, be interfered with by the appellate court, unless counsel is permitted, against objections, to make or persevere in improper remarks. In the absence of timely objection and exception to such remarks, they will be deemed to have been waived. *Sidekum* v. *Wabash etc. R'y Co.*, 549.

See CRIMINAL LAW; CORPORATIONS; ESTOPPEL; MORTGAGES; OFFICE AND CERS; RAILROADS.

PRESCRIPTION.

RIGHT ACQUIRED BY PRESCRIPTION IS ONLY COMMENSURATE WITH RIGHT ENJOYED. The extent of the enjoyment measures the extent of the right. The right gained by prescription is always confined to the right as exercised for the full period of time required by the statute. *Boynton* v. *Longley*, 781.

PROCESS.

MALICE AND WANT OF PROBABLE CAUSE MUST CONJOIN to render actionable the misuse or abuse of legal process in the common-law or ordinary remedies. *Eslava* v. *Jones*, 699.

POWERS.

See AGENCY.

PROFIT A PRENDRE.

See EASEMENTS; INJUNCTIONS.

RAILROADS.

1. PROCEEDING TO ENFORCE PAYMENT OF JUDGMENT FOR ANIMALS KILLED OR INJURED BY RAILROAD COMPANY, under section 4030, Indiana Revised Statutes of 1881, is an original proceeding to be instituted only in the circuit court of the proper county, the decision in which is a final judgment, from which an appeal will lie to the supreme court, without regard to the amount of the original judgment sought to be enforced. *Chicago etc. R'y Co.* v. *Summers*, 615.

2. COMPLAINT IS SUFFICIENT ON DEMURRER, although, it seems, a motion to make it more certain and specific would be granted, where, in a proceeding under section 4030, Indiana Revised Statutes of 1881, to enforce payment of a judgment for animals killed and injured by a railroad company, it alleges that the "judgment was upon a complaint for stock killed and injured by said railway company," without showing that the stock were killed by the "cars, locomotives, or other carriages" of the company as mentioned in the statute. *Id.*

3. PLEADING REQUIRED TO BE FILED BY PLAINTIFF IN PROCEEDING TO ENFORCE PAYMENT OF JUDGMENT for animals killed or injured by a railroad company, under section 4030, Indiana Revised Statutes of 1881, although called in the statute a "motion," may be demurred to or answered as in other civil cases. *Id.*

4. RIGHTS OF TRAVELER AND OF RAILROAD COMPANY UPON HIGHWAY CROSSING ARE EQUAL, in a sense; but the right of the company is superior in respect to the priority of passage. *Ohio & M. R'y Co.* v. *Walker*, 638.

5. RAILROAD COMPANY IS NOT BOUND TO BRING TRAIN TO STOP, OR TO SLACKEN ITS SPEED, when a person is seen crossing, or about to cross, the track at its intersection with a highway, but may presume that such person will take all proper precautions to avoid injury. *Id.*

6. EVIDENCE THAT BRAKEMEN ON RAILROAD TRAINS ARE IN HABIT OF EJECTING FROM TRAIN TRAMPS who refuse to pay their fare, is admissible to prove that it is within the line of a brakeman's duty to eject a person for the non-payment of his fare. *St. Louis, I. M., & S. R'y* v. *Hendricks*, 220.

7. EVIDENCE OF DEFECT IN RAILROAD TRACK MUST BE CONFINED TO TIME OF CASUALTY, of which it is alleged to have been the cause, or to proof of

such a state of facts, so shortly before or after it, as will induce a reasonable presumption that the condition was unchanged. The jury cannot, without proof, infer the existence of the defect. *Little Rock and Fort Smith R'y Co.* v. *Eubanks*, 245.

See COMMON CARRIERS; EMINENT DOMAIN; EQUITY, 6; NEGLIGENCE.

RAPE.

See CRIMINAL LAW, 95–98.

RECEIVERS.

RECEIVER OF INSOLVENT CORPORATION APPOINTED IN NEW JERSEY TO ADMINISTER ASSETS THERE HAS NO POWER to transfer to a foreign jurisdiction any question touching the appropriation and distribution of such assets. He cannot thus deprive the court which appointed him of its authority over him and over the fund which he holds as its officer. *Reynolds* v. *Stockton*, 305.

RECORDS.

THAT RECORDS OF COURT SHOULD BE SIGNED BY JUDGE IS NOT ESSENTIAL to their validity, in Missouri. *Fontaine* v. *Hudson*, 515.

REFEREES.

See ATTORNEYS AT LAW, 2.

REGISTRATION.

See MORTGAGES.

REMAINDERS.

See HUSBAND AND WIFE, 1.

REPLEVIN.

See SALES, 1.

RESCISSION.

See CONTRACTS.

SALES.

1. DELIVERY SUFFICIENT TO COMPLETE SALE. — Where agent of purchaser buys wheat stored in a warehouse, and orders it delivered on cars, and it is removed from the warehouse and put in the cars by rightful act duly authorized, after which the cars are side-tracked awaiting transportation, this is sufficient delivery to the purchaser to exempt the wheat from liability to seizure under a writ of replevin at the instance of a third party who claims title to it. *Allen* v. *Agee*, 206.

2. IT IS BUYER'S OWN FAULT IF HE IS SO NEGLIGENT as not to ascertain the right of the vendor to sell, and he cannot successfully invoke his *bona fides* to protect himself from liability to the true owner, who can only be divested of his rights or title to his property by his own act, or by operation of law. Every one is bound at his peril to ascertain in whom the real title is vested, and no matter how much diligence he may exert to that end, he must abide by the consequences of any mistake. *Velsian* v. *Lewis*, 184.

3. MERE POSSESSION OF ANOTHER'S PROPERTY affords no evidence that the person having possession has power to sell, and he who purchases or intermeddles with it must see that he is protected by the authority of one who has power to sell. *Id.*

4. POSSESSION TAKEN UNDER PURCHASE from one without title, and who has himself been guilty of conversion in disposing of the goods, is possession unauthorized and wrongful at its inception, and which the absence of evil intent in the purchaser cannot make rightful or lawful. *Id.*

5. ON QUESTION OF SOUNDNESS OF HORSE, it is relevant and competent to prove what kind of and how much work was done by the animal while in the purchaser's hands. *Whitworth* v. *Thomas*, 725.

6. SELLER OF HORSE WHO REPRESENTS HIM TO BE SOUND, knowing him to be unsound, and thereby misleading the purchaser, who is unable to discover the defect by ordinary observation, perpetrates a fraud which will entitle the purchaser to rescind on demand made within a reasonable time after the discovery of the fraud. *Id.*

See AGENCY; BONA FIDE PURCHASERS; TROVER.

SCHOOLS.

1. TEACHER'S RIGHT TO CHASTISE PUPIL IS RESTRICTED to the limits of his jurisdiction and responsibility as a teacher, and is not a general right, like that possessed by a parent. *Van Vactor* v. *State*, 645.

2. TEACHER MAY EXACT COMPLIANCE WITH ALL REASONABLE COMMANDS within the limits of his jurisdiction, and may, in a kind and reasonable spirit, inflict corporal punishment upon a pupil for disobedience. *Id.*

3. PUNISHMENT INFLICTED BY TEACHER UPON PUPIL SHOULD NOT BE CRUEL OR EXCESSIVE, and ought always to be apportioned to the gravity of the offense, and within the bounds of moderation; but when complaint is made, the calm and honest judgment of the teacher as to what the situation required should have weight, and the reasonableness of the punishment determined by the varying circumstances of the particular case. *Id.*

4. INTENT NECESSARY TO SUPPORT CHARGE OF ASSAULT AND BATTERY, IN CASE OF CHASTISEMENT OF PUPIL BY TEACHER, may be inferred from the unreasonableness of the method adopted, or the excess of force employed, but the burden of proving such unreasonableness or excess is upon the state. *Id.*

5. TEACHER HAS PRESUMPTION OF HAVING DONE HIS DUTY, in support of his defense, in addition to the general presumption of his innocence, in a prosecution against him for assault and battery in inflicting corporal punishment upon a pupil. *Id.*

6. LEGITIMATE OBJECT OF CHASTISEMENT OF PUPIL BY TEACHER IS TO INFLICT PUNISHMENT by the pain which it causes, as well as the degradation which it implies; and it does not follow that a chastisement was cruel or oppressive because pain was produced or abrasion of the skin resulted from a switch used by the teacher. *Id.*

7. CHARACTER OF CHASTISEMENT OF PUPIL BY TEACHER, WITH REFERENCE TO ANY ALLEGED CRUELTY OR EXCESS, MUST BE DETERMINED, when a proper weapon has been used, by the nature of the offense, the age, physical and mental condition, as well as the personal attributes of the pupil, and the deportment of the teacher. *Id.*

SEQUESTRATION.

See JURISDICTION, 5.

SERVITUDES.

See WATERS.

SET-OFF.

IN STATUTORY ACTION CORRESPONDING TO DETINUE, there can be no set-off or recoupment of damages. *Whitworth* v. *Thomas*, 725.

SHERIFFS.

See EXECUTIONS.

SPECIFIC PERFORMANCE.

1. COURTS OF EQUITY WILL DECLINE JURISDICTION TO DECREE SPECIFIC PERFORMANCE OF CONTRACT FOR PERSONAL SERVICES involving the exercise of special skill, judgment, and discretion, continuous in their nature, and running through an indefinite period of time; and injunctions to prevent the breach of such contracts are granted with great caution by the courts, although the remedy by damages at law may be inadequate. *Iron Age P. Co.* v. *Western Union Tel. Co.*, 758.
2. CONTRACTS, IN ORDER TO BE ENFORCED BY SPECIFIC PERFORMANCE, must be mutual in obligation as well as in remedy. The rule is, that equity will not enforce the performance of continuous duties, involving personal labor and care of a particular kind, which the court cannot superintend. *Id.*
3. BILL IN EQUITY IN NATURE OF SPECIFIC PERFORMANCE IS DEMURRABLE FOR UNCERTAINTY and indefiniteness, where, seeking by the auxiliary force of an injunction, to prevent the breach of an alleged contract for personal services, it does not allege when nor where the contract was made, nor where to be performed, nor the consideration agreed to be paid, and fails to give the name of the defendant's agent by whom the contract was alleged to have been made. *Id.*

STATUTES.

1. STATUTES WILL BE CONSTRUED SO AS TO EFFECT PURPOSES for which they were enacted, and if necessary to that end, they will be held to be retroactive, although they do not in terms so direct, unless this would result in the impairment of some vested right or the violation of some constitutional guaranty. *Connecticut M. L. I. Co.* v. *Talbot*, 655.
2. IN CONSTRUING STATUTES, COURTS, IN ORDER TO ASCERTAIN the intention of the legislature, will judicially notice such contemporaneous history as led to and probably induced the passage of the laws. *Id.*

See CONSTITUTIONAL LAW.

STATUTE OF LIMITATIONS.

1. LEGAL MAXIM, "LAPSE OF TIME DOES NOT BAR THE RIGHT OF THE STATE," applies only in favor of the sovereign power, and has no application to municipal corporations deriving their powers from the sovereign. Therefore, the statute of limitations runs for or against school districts or other municipal corporations as it does for or against individuals. *May* v. *School District*, 266.
2. PRESUMPTION OF PAYMENT OF DEBT FROM LAPSE OF TIME MAY BE OVERCOME by other facts and circumstances, for such presumption is rebuttable. *Lewis* v. *Schwenn*, 511.

3. QUESTION OF PRESUMPTION OF PAYMENT FROM LAPSE OF TIME IS ONE OF FACT AND LAW, and cannot be determined by the court until all the evidence upon the point is before it. *Id.*

4. TEN YEARS' STATUTE OF LIMITATIONS WITH RESPECT TO PERSONAL ACTIONS APPLIES TO NOTE secured by mortgage, so as to prevent any judgment over, but as to the mortgage itself, and relief thereon, the ten years' statute with respect to real actions must be resorted to. *Id.*

5. DEED OF TRUST OR MORTGAGE MAY BE ENFORCED AGAINST LAND by trustee's sale or foreclosure, although the note or bond secured thereby may be barred so that no action can be maintained thereon. *Id.*

6. JURISDICTION. — Proceedings in an attachment in equity were instituted in a Virginia court, in July, 1861, against a non-resident debtor in the state of New York, and a garnishee resident in Virginia. Service of process was made on the latter, and an order of publication was made against the former. The subject of suit was within the five years' limitation of the Virginia statute. The non-resident debtor in New York was brought into the case by amended bill, in December, 1879, and interposed the plea of the statute of limitations. *Held*, — 1. That the proceedings against him under the order of publication, being void, did not suspend the running of the statute; 2. That the defendant being a citizen and resident of New York, the case was not within the saving clause of the statute (Va. Code 1873, c. 146, sec. 20), which applies to a debtor "who had before resided in this state"; 3. No defense having been raised by replication in the court below, to the statute of limitations, it is too late to make it for the first time in the appellate court. *Dorr* v. *Rohr*, 106.

See ADVERSE POSSESSION, 1, 2; PRESCRIPTION.

SUBROGATION.

See INSURANCE, 1.

SURETYSHIP.

1. WHEN COUNTY TREASURER RECEIVES MONEYS IN HIS OFFICIAL CAPACITY, AS COUNTY TAXES, HE AND HIS SURETIES ARE ESTOPPED TO DENY that they are the moneys of the county, for the lawful disbursement of which he is responsible on his official bond, whatever the character of the papers given by him to the collector as representing the amounts so received. *Coleman* v. *Pike Co.*, 746.

2. WHILE BOOKS AND ENTRIES MADE BY COUNTY TREASURER, OR HIS AGENT, ARE PRIMA FACIE evidence against him and his sureties, yet entries made by the agent after the termination of his agency by the death of the treasurer are not binding on him or his sureties, and are not admissible in evidence against them. *Id.*

3. IN ACTION AGAINST SURETIES ON OFFICIAL BOND OF DECEASED COUNTY TREASURER, seeking to charge them with a default of their principal, the tax collector, and the probate judge who acted as the agent of the treasurer in attending to his official duties, may each testify to their transactions with him. *Id.*

4. RECEIPT IN FORM OF I O U, GIVEN BY COUNTY TREASURER TO TAX COLLECTOR, IS ADMISSIBLE as evidence against the sureties of the treasurer, since deceased, and it is competent to show, by parol evidence, that the instrument was intended as a receipt for so much of the county

tax, to be accounted for in a settlement with the collector at the end of the month. *Id.*

See GUARDIAN AND WARD.

TAXATION.

See EJECTMENT, 3.

TENDER.

LEGAL EFFECT OF PLEA OF TENDER is an irrebutable presumption of indebtedness to the extent of the tender; and when it is brought into court, that amount is considered as stricken from the complaint; and if more is claimed, plaintiff proceeds for the excess of his demand above the tender only. *Supply Ditch Co.* v. *Elliott*, 586.

TORTS.

See TROVER.

TROVER.

1. MERE BAILEE, WHETHER COMMON CARRIER OR OTHERWISE, IS NOT GUILTY OF CONVERSION, though he receive property from one not rightfully entitled to possession, and, acting as a mere conduit, deliver it in pursuance of the bailment, if this be done before he has notice of the rights of the real owner. But if he has such notice, his *status* is altered, and he delivers possession at his peril. *Nanson* v. *Jacob*, 531.
2. SECTION 1018, REVISED STATUTES OF MISSOURI, DOES NOT APPLY TO ACTIONS OF TROVER AND CONVERSION, nor was it intended to apply to common carriers. *Id.*
3. AT COMMON LAW, CONVERSION IS TORT committed by a person who deals with chattels not belonging to him, in a manner inconsistent with the rights of the lawful owner. *Velsian* v. *Lewis*, 184.
4. TAKING POSSESSION OF PERSONAL PROPERTY under contract of purchase is an act based on the assumption of ownership, or a right of dominion over the thing converted, where the vendor is without title, and though without evil intent, is a conversion for which trover lies without previous demand. *Id.*
5. INTENT WITH WHICH WRONGFUL ACT IS DONE on the part of party is not an essential element of conversion, but it is enough that the true owner has been deprived of his property by the unauthorized act of some one who assumes dominion or control over it. *Id.*
6. CONVERSION MAY CONSIST SIMPLY OF PURCHASE, even by an innocent party, of goods or chattels from one who has been guilty of conversion in disposing of them, where the buyer takes them into his possession or custody; and as trover and replevin are concurrent remedies whenever the taking is wrongful, any case in which replevin will lie without demand will support trover. *Id.*
7. PURCHASING PERSONAL PROPERTY FROM ONE WHO HAS NO RIGHT to sell, and holding it to the buyer's use, is a conversion, for which trover or replevin will lie without previous demand or refusal. *Id.*
8. IT IS ONLY WHERE ONE OBTAINS POSSESSION of property lawfully that demand is necessary to support replevin or trover. *Id.*
9. WHERE PARTY SELLING WHEAT IN WAREHOUSE has no *indicia* of ownership or power to sell, or the warehouseman no authority to deliver, so

that neither title is conferred, nor lawful possession given or taken, the owner may assert his title and right to immediate possession as against the purchaser, however innocent of evil intent, by suit in trover, without previous demand. *Id.*

TRUSTS.

See CHARITABLE USES; WILLS, 2.

UNINCORPORATED SOCIETIES.

See CORPORATIONS, 39–41.

VENDOR AND VENDEE.

1. IN ACTIONS ON COVENANTS AGAINST ENCUMBRANCES, PLAINTIFF IS ENTITLED to the actual damage sustained by the breach of the covenant. If evicted, and there is a total failure of consideration, he will recover the value of the land at the time of eviction, if he has paid the purchase-money. If the purchase-money has been partly paid, he will recover the amount with interest, not exceeding the value of the land. The consideration having been paid, if the purchaser removes the encumbrance, the damages are the amount paid for that purpose, not exceeding the value of the land. But if the purchaser has paid nothing towards the removal of the encumbrance, and is not evicted, he will recover only nominal damages. *Beecher* v. *Baldwin*, 57.
2. COVENANT OF WARRANTY, NOMINAL DAMAGES FOR BREACH OF. — The defendants owned land which was heavily mortgaged to Yale College. They sold a part of it, subject to the mortgage, to the plaintiff, it being understood that the mortgage was to be removed, so as to give the plaintiff a clean title. The plaintiff paid a small part of the purchase-money, received a warranty deed, with a covenant against encumbrances, and gave notes and a mortgage back for the balance of the purchase-money, the college agreeing to quitclaim its interest in the premises to the plaintiff in consideration that the purchase-money, when paid, be applied to the payment of its mortgage. The plaintiff failed to pay the notes, and the college foreclosed its mortgage and evicted the plaintiff. At this time the property had depreciated in value, and was worth much less than the unpaid portion of the purchase-money. In this action by the plaintiff on the covenants of warranty and against encumbrances, *held*, that the plaintiff was entitled to recover at most but nominal damages, but as the defendants had pleaded a set-off of the notes given for the purchase-money, there could be no recovery on the part of the plaintiff. *Id.*
3. IN ACTION FOR BREACH OF COVENANT OF WARRANTY IN DEED, NOTES GIVEN FOR PURCHASE-MONEY CONSTITUTE a proper equitable set-off, which may be pleaded as such, although the notes, as an independent cause of action, are barred by the statute of limitations. *Id.*
4. VENDOR'S LIEN — TITLE MADE IN NAME OF THIRD PERSON. — Where the purchaser of land gives his note for the unpaid balance of purchase-money, but at his request the legal title is made to a third person, the vendor's lien for the unpaid purchase-money attaches, without any special agreement for its retention, and follows the land in the hands of such grantee. *Crampton* v. *Prince*, 718.
5. BURDEN OF PROVING WAIVER OF VENDOR'S LIEN, as between vendor and purchaser, is cast on the latter. *Id.*

6. ENFORCEMENT OF VENDOR'S LIEN — COVERTURE AS A DEFENSE. — Where a married woman purchases land through the agency of her husband, who, in her name and by her authority, executes a promissory note for the unpaid balance of purchase-money, her coverture is no defense to a suit in equity to enforce a vendor's lien on the land, but is a defense to an action against her at law on the note. *Id.*

7. PURCHASER CANNOT CLAIM ABATEMENT OF PURCHASE-MONEY BECAUSE OF DEFICIENCY of a few feet less in depth than stated in the deed, it appearing that the lot was sold in gross, that no representations were made as to its area, and that the boundaries were patent to ordinary observation and well known to the purchaser. *Id.*

VERDICT.

See JURY AND JURORS; NEW TRIAL; PLEADING AND PRACTICE.

VOLUNTARY ASSOCIATIONS.

See CORPORATIONS, 39–41.

WAREHOUSEMAN.

IT IS DUTY OF WAREHOUSEMAN NOT TO DELIVER GOODS or grain deposited to any other person than the depositor, except on his order, or by his consent or authority. *Velsian* v. *Lewis*, 184.

See SALES, 1; TROVER, 9.

WATERS.

1. TITLE OF RIPARIAN OWNER OF LAND ON RIVER EXTENDS to the middle of the stream if it is non-navigable, and to the line of high water if navigable. *Welles* v. *Bailey*, 48.

2. RIPARIAN OWNER TAKES ALL ACCRETIONS from the gradual change of a river-bed; and this principle applies where land, though not originally riparian, becomes so when the river reaches it by gradually washing away all the intervening land. The remoter land then becomes riparian as much as if it had been originally such, and all the incidents of riparian land attach thereto. *Id.*

3. WHEN PORTION OF RIPARIAN LAND IS WASHED AWAY BY STREAM, riparian owner becomes entitled to the land under the water so far as the center of the stream, if non-navigable, without reference to the original limit of his land or to his upland lines. He takes whatever front upon the stream its change of bed gives him, and by lines that run from the termini of his upland lines at right angles to the center line of the stream; and the same rule applies in the case of navigable waters, the lines to low-water mark being extended on the same principle. *Id.*

4. APPLICATION, IN CIRCUMSTANCES SOMEWHAT PECULIAR, of the principle of accretion and reliction, growing out of changes in the bed of the Connecticut River. *Id.*

5. RIPARIAN PROPRIETORS ALL HAVE RIGHT, AT COMMON LAW, TO REASONABLE USE OF WATERS OF STREAM running through their respective lands for the purpose of irrigation; but what is a reasonable use must be determined in each case with reference to the size of the stream, the velocity of the water, the character of the soil, the number of proprietors, the amount of water needed to irrigate, and a variety of other circumstances and conditions surrounding each particular case, the true

test in all cases being whether the use is of such a character as to materially affect the equally beneficial use of the waters of the stream by the other proprietors. *Jones* v. *Adams*, 788.

6. RIPARIAN PROPRIETORS HAVE NOT RIGHT, AT COMMON LAW, TO ABSOLUTELY DIVERT ANY PORTION OF WATER away from the stream, nor to any definite quantity for the purpose of irrigation, but each has the right to a reasonable use of the water, determined by the particular facts and circumstances as revealed by the evidence. *Id.*

7. COMMON-LAW DOCTRINES, DECLARATORY OF RIGHTS OF RIPARIAN PROPRIETORS RESPECTING USE OF RUNNING WATERS, were held to be inapplicable, or applicable only to a very limited extent, to the wants and necessities of the people in all the Pacific Coast states and territories, prior to the act of Congress of July 26, 1866, and prior appropriation was held to give the better right to the use of the waters to the extent, in quantity and quality, necessary for the uses to which they were applied. *Id.*

8. ACT OF CONGRESS OF JULY 26, 1866, CONFIRMED TO OWNERS OF WATER RIGHTS IN PUBLIC LANDS OF UNITED STATES the same rights which they held under the local customs, laws, and decisions of the courts prior to its enactment, and did not introduce, and was not intended to introduce, any new system, or to evince any new or different policy upon the part of the general government, but recognized, sanctioned, protected, and confirmed the system already established by the customs, laws, and decisions of courts, and provided for its continuance. *Id.*

9. COLORADO CONSTITUTION DEDICATES ALL UNAPPROPRIATED WATER in the natural streams of the state to the use of the people, the ownership being in the public, and it guarantees the right of division and appropriation for beneficial purposes. *Wheeler* v. *Northern Colorado Irrigation Co.*, 603.

10. COLORADO CONSTITUTION, WITH CERTAIN QUALIFICATIONS, recognizes and protects prior right of user acquired through priority of appropriation. *Id.*

11. TITLE TO WATER APPROPRIATED, save, perhaps, the limited quantity actually flowing in the consumer's ditch, remains in the general public, while the paramount right to its use, unless forfeited, remains in the appropriator, under the Colorado constitution. *Id.*

12. TO CONSTITUTE LEGAL APPROPRIATION, WATER DIVERTED must be applied within a reasonable time to a beneficial use. *Id.*

13. DIVERSION OF WATER RIPENS INTO VALID APPROPRIATION only when the water is utilized by the consumer, though priority of appropriation may date, proper diligence having been used, from the commencement of the canal or ditch. *Id.*

14. APPROPRIATOR DOES NOT BECOME PROPRIETOR of water diverted, though he acquires certain peculiar rights therein; the public are still entitled to its use upon paying reasonable compensation therefor. *Id.*

15. UNDER COLORADO CONSTITUTION, ONE TRANSPORTING FOR HIRE WATER owned by the public to those entitled to its use is a *quasi* public servant or agent, charged with a public duty or trust, and an attempt to use his monopoly for the purpose of coercing compliance with unreasonable and exorbitant demands lays the foundation for judicial interference and regulation. *Id.*

16. CARRIER TRANSPORTING WATER FOR HIRE cannot charge the consumer for exercising his constitutional right to use the water, nor can it collect a

part of its annual transportation charge in advance for the remaining years of its corporate life as a condition precedent to the use of the water. While it is entitled to reasonable compensation, such charge is illegal, unreasonable, and oppressive. *Id.*

17. WATER DISCHARGED FROM ARTIFICIAL INTO NATURAL CHANNEL, as a matter of convenience, and without any intention to reclaim it, is abandoned, and becomes a part of the natural stream, and subject to the same rights as the water naturally flowing therein. *Schuh* v. *Sweeny*, 888.

18. SURFACE WATER MAY BE OBSTRUCTED IN ITS FLOW BY OWNER OF LAND OVER WHICH IT FLOWS, although the effect is to set the water back upon adjoining land next above him; and the case is not affected by the fact that the obstruction consists of a tight board fence built in part on a portion of the division line, which, by the agreement of the parties, was to have been fenced by the adjoining owner. *Chadeayne* v. *Robinson*, 55.

19. PREVAILING DOCTRINE AS TO FLOW OF WATER CAUSED BY RAIN, SNOW, OR NATURAL DRAINAGE IS, that when two tracts of land are adjacent, and one is lower than the other, the owner of the upper tract has an easement in the lower land to the extent of the water naturally flowing from the upper land to and upon the lower tract, and any damage occasioned to the lower land thereby is *damnum absque injuria*. But this doctrine only applies to waters which flow naturally from such causes. The servitude of the lower land cannot be augmented or made more burdensome by the acts or industry of man. *Boynton* v. *Longley*, 781.

20. UPPER LAND-OWNER, WHILE HAVING UNDOUBTED RIGHT TO MAKE REASONABLE USE OF WATER FOR IRRIGATION, must so use, manage, and control it as not to injure his neighbor's land by the discharge of the waste water thereon. *Id.*

21. MERE ACQUIESCENCE OR PERMISSION ON PART OF LOWER LAND-OWNER to allow the flow of waste or surplus water in such limited quantity as did his land no injury cannot be so construed as to give the upper land-owner a prescriptive right to increase the flow to such an extent as to damage the land of such lower land-owner. *Id.*

22. TOWN—LIABILITY FOR INJURY RESULTING FROM OBSTRUCTION OF STREAM. —An act of the legislature authorized the defendant town to deepen, etc., all the streams and watercourses within the limits of the town, at such times and in such manner as the public health, in the opinion of the selectmen, might require. Under this authority the selectmen, in the exercise of reasonable care, straightened and deepened the channel of a river running through the town, the work having been planned and laid out by a competent engineer employed by them. Ample provision was made for all ordinary floods in the river, but an extraordinary freshet afterwards occurred, when the ground was frozen and not able to absorb the water, and the new channel being narrowed by the addition of earth to its banks, the water was set back upon and injured the property of the plaintiff. *Held*, that the town was not liable, although the injury resulted from the oversight or misjudgment of the engineer in permitting the excavated earth to be deposited on the banks of the new channel, which was no part of the original plan, but was done as required under a contract, the specifications of which were prepared by the engineer. *Diamond Match Co.* v. *Town of New Haven*, 70.

WILLS.

1. WORDS OF RECOMMENDATION, REQUEST, ENTREATY, WISH, OR EXPECTATION ADDRESSED TO LEGATEE or devisee will make him a trustee for the person or persons in whose favor such expressions are used, provided the testator has pointed out with sufficient clearness and certainty both the subject-matter and the objects of the intended trust. No particular form of expression is required to create a valid and binding trust. *Noe* v. *Kern*, 544.

2. PRECATORY TRUST MAY BE ATTACHED TO PROPERTY DEVISED TO ANOTHER ABSOLUTELY, provided the intention to so charge it appears from the will. *Id.*

3. IN CONSTRUING WILL, INTENTION OF TESTATOR IS TO BE ASCERTAINED, if possible, and in looking for the intention, the surrounding circumstances may be taken into consideration. *Id.*

4. ADVANCEMENT IS GIVING, BY ANTICIPATION, WHOLE OR PART of what it is supposed a child will be entitled to on the death of the party making it intestate. The definition embraces the idea that the party has irrevocably parted from his title in the subject advanced. *Darne* v. *Lloyd*, 123.

5. TESTATOR CAN DISPOSE OF HIS ESTATE BY WILL AS EFFECTUALLY AS HE COULD BY GIFT during his life, and, if he pleases, may turn a loan into an advancement, or, more accurately speaking, require that it may be treated as an advancement. *Id.*

See ESTATES OF DECEDENTS.

WITNESSES.

1. TO ENTITLE PARTY TO PROTECTION accorded to privileged communications, they must be made to the counsel, attorney, or solicitor acting, for the time being, in the character of legal adviser, and must be made by the client for the purpose of professional advice or aid upon the subject of his rights and liabilities. *Caldwell* v. *Davis*, 599.

2. TO IMPEACH A WITNESS BY PROOF THAT ANOTHER WITNESS WOULD NOT BELIEVE THE FORMER on oath, the latter must first testify that he knows the former's reputation among his neighbors for truth and veracity, and that such reputation is bad. The unwillingness to believe under oath must result from such bad reputation. Hence the material fact to be proved is that the reputation is bad. *Spies* v. *People*, 220.

3. JURY MUST DETERMINE WHETHER REPUTATION OF WITNESS FOR TRUTH AND VERACITY IS BAD, when witnesses of equal standing and credibility give conflicting testimony on the subject. *Id.*

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